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No. 523

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Supreme Court of the United States

October Term, 1965

ANTHONY ALBANESE,

Petitioner,

—against—

N.V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Co-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF ANTHONY ALBANESE

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ROBERT KLONSKY
On Petition

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Anthony Albanese, prays that a Writ of Certiorari be issued to review the revised decision and judgment of the United States Court of Appeals for the Second Circuit, filed June 15, 1965, and the denial of a petition for rehearing and rehearing *in banc,* filed June 15, 1965 with the revised opinion; reversing a final judgment entered in the United States District Court for the Southern District of New York on April 17, 1964, after a general jury verdict based on a longshoreman's personal injury action for maritime negligence and breach of respondent's warranty of seaworthiness.

The initial opinion of the Court of Appeals, decided on April 9, 1965 after argument on December 3, 1964, and the revised opinion of the Court of Appeals on June 15, 1965, filed with the denial of petitions for rehearing, are in the appendix to this petition as B and C. The revised opinion of June 15, 1965 is officially reported at 346 F. 2d 481. There was no written opinion by the trial Judge, Irving Ben Cooper, *D.J.*

Jurisdiction

Judgment was initially entered in the United States Court of Appeals on April 9, 1965, and withdrawn on June 15, 1965 for the entry of a new judgment on June 15, 1965 together with the revised opinion. Both judgments of the Court of Appeals reversed the judgment of the District Court on both the complaint and the claim over and remanded them for a new trial.

Jurisdiction to review the judgment by writ of certiorari is found in 28 U. S. C. 1254 (1) and 2101, as well as Rules 19 (1, b) and 20 of the Rules of this Court.

Questions Presented for Review

I

Because the trial Court's Charge to the jury defined maritime negligence to include *constructive notice* as a basis for finding lack of due care, was it not error for the Court of Appeals to reverse a longshoreman's judgment on the ground that he may only recover for maritime negligence if there be *actual notice* to the shipowner of a patently dangerous condition?

Fairly comprised in this question are the following:

1. Is there not retrogression in maritime law, in obvious disregard of clear and definitive holdings by this Court, for the Court of Appeals to dilute and reduce a longshoreman's remedy in negligence for injuries suffered aboard a merchant vessel on navigable waters, to less than he would expect in a common-law Charge on shore-based negligence?

2. Does the shipowner have a non-delegable duty to provide longshoremen with a reasonably safe place to work, sounding in negligence as well as unseaworthiness, to which it may respond in negligence on the trial Court's instruction, as follows:

"And apart from the actual notice you may find a condition which rendered the hold an unsafe area had existed for sufficient time to charge the defendant with constructive notice . . . the shipowner had a duty to the plaintiff to remedy those defects of which it knew or in the exercise of reasonable care should have known . . ."? (Vol. 1, App. to Def.-Appellant's brief, p. 16a.)

3. Though the Court of Appeals agrees there was sufficient evidence that "an unsafe condition in fact existed", and that there was no contributory negligence by petitioner, was reversal on the negligence cause of action justified on the basis that without control of the impact zone by active supervision of the stevedore's work the shipowner need not take "available steps to rectify a dangerous condition created by the stevedore which he does not know to exist"?

This question is asked in the context of admitted knowledge by officers of the shipowner that gasoline powered hilo machines were in use in the partly enclosed hatch,

that the parties agreed the hilos were not defective in any way so as to render the ship unseaworthy, and that the shipowner alone could have turned on the adequate ship's ventilating system, which it failed to do, thereby causing petitioner to suffer total and permanent brain damage by carbon monoxide poisoning.

II

On the second ground for reversing petitioner's judgment, in direct conflict with the 4th Circuit's *Provenza* v. *American Export Lines,* 324 F. 2d 660, was it error for the trial Court to instruct the jury that the pertinent provisions of the Safety and Health Regulations for Longshoring (promulgated by the Secretary of Labor pursuant to Public Law 85-742, Stat. 835, 33 U. S. C. A. 941 a to g, in effect before February 25, 1961, the date of the accident to petitioner), established generally accepted standards of safety equally binding on the shipowner and the stevedore?

III

Is there not a violation of petitioner's rights under the Seventh Amendment to the Constitution?

Statute Involved

Safety and Health Regulations for Longshoring, Public Law 85-742 (72 Stat. 835), 33 U. S. C. A. Section 941, of which the pertinent parts are Sections 9.1 (a and b) on Purpose and Authority, with references to compensation not read to jury; 9.2 (a and b) on Scope and Responsibility, also set forth in the footnote to the opinion below;

9.3 (c and d) on two definitions; 9.93(a) on the use of ventilation to reduce the carbon monoxide content of the hold, are all set forth in Appendix A to this petition. Also set forth in Appendix A is Section 9.93 (c, d and e) which petitioner's counsel offered but was not allowed in evidence.

Statement of the Case

In this maritime tort case the basis for federal jurisdiction in the Court of first instance was diversity of citizenship between petitioner, a citizen of the State of New Jersey, and respondent, a foreign corporation and citizen of The Netherlands, and damages in excess of the jurisdictional amount of $10,000.00 exclusive of interest and costs.

On February 25, 1961 the 51 year old petitioner, employed by the impleaded stevedore, was assigned to the No. 2 lower hold of respondent's M.S. SCHIEDYK for the purpose of loading steel sheets and tinplate. It was known to respondent and the stevedore that a gasoline powered hilo machine was required to move the heavy cargo in the hold. A second hilo in the upper 'tween deck was also used when another stevedore gang came at 10:45 A.M. to load similar cargo. The upper 'tween deck was partly covered with hatch boards to serve as a platform for the second gang. The hold was further confined by the placement of a rain tent over the square on the main deck. Though the hilos were in good condition, they necessarily emitted carbon monoxide fumes which affected the air in the lower hold. The ship was equipped with an adequate and operable air ventilating system, which could only be turned on by a ship's officer.

At no time prior to petitioner's collapse at about 11:20 A.M. had the ventilating system been turned on.

There was testimony by two longshoremen that they had requested the ship's mate on duty to turn on the ventilating system, that he assured them it would be done, and in the words of the opinion below "... that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed some time between 11:15 and 11:30 a.m. the blowers had not been turned on and the men left the hatch". The Court of Appeals does not refer to or acknowledge the following statement by respondent on page 5 of its brief on appeal:

> "For the purposes of this appeal it is, of course, assumed that the request to a mate to put on the ship's ventilating system, his promise to do so and request that the men keep working, is an established fact".

There is unequivocal testimony from the ship's mates, however, that they knew two hilo machines were in use in the partially covered hatch, that it was a good custom with these machines in the hold to turn on the ship's ventilating system, even when not requested to do so, and they were well aware of the toxic property of carbon monoxide fumes. (Vol. II, App. to Pl.-Appellee's brief, pp. 21a, 24a, 26a, 27a, 28a, 29a; Vol. I, App. to Def.-Appellant's brief, pp. 209a, 221a, 227a.)

Petitioner collapsed on part of the cargo when he and the other holdmen attempted to leave the air-contaminated lower hold. Respondent did not call a single expert witness to deny the proof of petitioner's total and permanent brain damage caused by exposure to carbon monoxide poisoning. The trial Court's instruction that petitioner was free of any contributory negligence as a matter of law was affirmed by the Court of Appeals, stating " . . . evidence was lacking that Albanese knew of the complaints or appreciated the

danger on the day of his injury, or indeed had any real choice of action if he had".

Though the opinion below finds sufficient evidence for the jury to conclude an unsafe condition in fact existed, which "might well have supported a verdict based on unseaworthiness", additional to the purported error of instruction on constructive notice, it finds error in the instruction that was not repeated in the jury Charge, to the effect that the Safety and Health Regulations were binding on the shipowner. The reasoning of the Court of Appeals which is not supported by the record as a whole is threefold;—that Section 9.2(b) is an excluding clause meant to absolve a shipowner from the standards of safety expressed in the regulations—that there was no testimony as to what the actual concentration of carbon monoxide in the hold was with respect to the level having been reached at which the stevedore was forbidden to work without blowers—that such regulations are not relevant to the issues between the petitioner and the shipowner and would tend to confuse the jury.

There is no reference in the opinion to the directly contrary 4th Circuit opinion of *Provenza* v. *American Export Lines*, 324 F. 2d 660, frequently mentioned and briefed on appeal by all parties. Respondent's brief on appeal at page 16 candidly refers to the regulations in light of *Provenza, supra,* as " . . . establishing a generally accepted standard of safety". Respondent itself first referred to these regulations, and offered portions thereof in evidence before the same jury that was also to decide the claim over. The trial Court allowed certain sections to be read to the jury, and denied admission of others offered by petitioner's counsel, all set forth in Appendix A to this petition. This Court's *Kernan* v. *American Dredging Co.*, 355 U. S. 426

was also a basis of the trial Court's instruction that a violation of a safety regulation binds the shipowner.

The opinion below does not discuss the portion of Section 9.2 on Scope and Responsibility that reads "nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom". Also overlooked was the uncontradicted proof of substantial air-contamination in the lower hold before and during petitioner's collapse, for which the shipowner cannot contend a new responsibility or duty. Though no one scientifically measured the level of gas concentration when petitioner was caused to suffer permanent brain damage, all being otherwise occupied at the time, particularly the mate on duty who was away from his post when the men came out of the hold shortly before police came to the scene, there is uncontradicted testimony and proof as to the dangerous level that exceeded the limits of safety. Even after the men had left and the hilos ceased operating, a police officer looked into the hold and observed its "hazy" condition. Petitioner's medical expert, uncontradicted by any other expert, testified that from the effect on petitioner one must assume an adequate concentration to cause intoxication by this odorless and colorless gas; that 2 per cent of carbon monoxide is sufficient to kill a person in a few minutes because hemoglobin has an affinity to it; that the effect varies with individuals, older persons suffering more because of their slower circulation time. At the time of the accident petitioner was 51 years of age.

The revised opinion cites *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, 282 F. 2d 137, C.A. 2 1960, 302 F. 2d 840, C.A. 2 1962, without reference to this Court's fulcrum opinion at 358 U. S. 613

which reversed the first Court of Appeals opinion at 251 F. 2d 708. There is no proof that the carbon tetrachloride the shipowner required as a cleaning agent in *Halecki, supra,* was more deadly than the carbon monoxide fumes from hilo machines that were required to be used in the hold for the placement of respondent's cargo of steel and tinplate. *Halecki, supra,* is cited in the opinion below for negligence only, "where the shipowners required the use of the deadly cleaning agent and were held under a duty of care in selecting competent contractors to work with it, or supervising its use".

On a general verdict, no party requesting special interrogatories, the unanimous federal jury assessed damages in the amount of $145,000.00 for petitioner's total and permanent disability and exonerated the stevedore on the shipowner's claim over. Both verdicts were reversed on appeal by an opinion dated April 9, 1965. When petitioner moved for a rehearing the Court revised its opinion on June 15, 1965, but concluded as before. The difference between the two opinions relates to the instruction on maritime negligence, holding in the first opinion that constructive notice must be excised on the authority of *Filipek* v. *Moore-McCormack Lines, Inc.,* 258 F. 2d 734, C.A. 2 1958, cert. den. 359 U. S. 927 (on personal injuries of a boom tester held to be in the category of a repairman, not a longshoreman), and in the second opinion adding the authority of *Berti* v. *Compagnie de Navigation, etc.,* 213 F. 2d 397, C.A. 2 1954 (on personal injuries to a longshoreman caused by the negligent manner in which the stevedore did its work while in control of the operation and equipment), and *Halecki, supra.*

Reasons for Granting the Writ

The significance of the opinion below in the sensitive field of maritime law, written with apparent disregard of the paramount authority of well defined principles enunciated by this Court, is that it seeks to establish a novel and retrogressive principle of law exonerating a shipowner from its historic and non-delegable obligation of due diligence and care when it knew or should have known that a longshoreman was working in an unsafe place aboard its merchant vessel in navigable waters. By this decision a remedy in negligence for maritime workers doing the work of seamen is diluted to less than any other common-law personal injury litigant would expect. Error is compounded where the opinion would refuse a jury to hear and weigh the standards of safety promulgated by the Secretary of Labor, which in this case do not add new responsibilities or duties on shipowners, and where the instant respondent sought to introduce them before the same jury solely against the stevedore in its claim over. The dissent by the late Chief Judge Clark in *Palermo* v. *Luckenbach Steamship Co., Inc.*, 246 F. 2d 557, 561 C.A. 2, reversed summarily by this Court at 355 U. S. 20, 78 S. Ct. 1, is applicable here where he wrote:

> "I have had occasion recently to express my concern at a growing tendency in this court to upset awards in jury cases . . . To-day's decision continues that trend, adding some new curiosities".

The instant opinion's "new curiosities" that adversely affect the uniform fabric of the maritime law, are as follows:

1. On removing constructive notice as part of the definition of maritime negligence, by citing inapposite and

long overruled cases on concepts of control and supervision, the Court of Appeals ignores the fundamental definition of maritime negligence, contrasted with the separate and distinct cause of action for unseaworthiness. In *Gutierrez* v. *Waterman S.S. Corp.*, 373 U. S. 206, this Court recently defined shipowner *negligence* to mean "when it knew or should have known that injury was likely to result . . ." (p. 210 of 373 U. S.); and "control of the impact zone is not essential for negligence", and "it had an absolute and non-delegable duty of care toward petitioner not to create this risk to him, which it failed to meet" (pp. 211, 212 of 373 U. S.).

2. Adding *Berti* v. *Compagnie de Navigation, etc.*, 213 F. 2d 397, C.A. 2 1954, and *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Assoc., supra,* the revised opinion below still is without decisional authority to support the excision of constructive notice that the Court below initially sought in *Filipek* v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734, C.A. 2 1958, cert. den. 359 U. S. 927.

Berti, supra, of doubtful authority even in its most narrow construction to deny liability "only upon the negligent manner in which the independent contractor did the work", *Pioneer S.S. Co.* v. *Hill,* 227 F. 2d 264, C.A. 6 1955, opinion by Potter Stewart, *C.J.*, was also restricted by Learned Hand, *C.J.* in *Amador* v. *A/S J. Ludwig Mowinckels,* 224 F. 2d 437, 441, C.A. 2 1955, holding that *Berti* " . . . decided no more than that in spite of the defects—in that case of gear—the ship was 'reasonably' fit for her service, which is the accepted test". After this Court in *Crumady* v. *The Fisser,* 358 U. S. 423 (1959), held negligence may cast the shipowner into initial liability, Hoffman, *D.J.* in *Holley* v. *The Manfred Stansfield,* 186 F. Supp. 212, 215 observed the *Berti* rule to be of "questionable vitality in the light of

Crumady". As in *Crumady*, and unlike *Berti*, the instant case is not concerned with the negligence of the stevedore, but relates to proof of neglect of the shipowner, particularly the shipowner's affirmative failure of obligation to turn on the ship's adequate ventilation system, contrary to its assurances and its direction to the longshoremen to continue work.

In exonerating the stevedore, the jury obviously believed that after receiving complaints from the longshoremen, the ship's mate assured them he would turn on the ventilating system and directed them to continue the work. This fact constitutes actual notice to the shipowner and renders academic any question of constructive notice.

Reference in both opinions below to *Filipek, supra,* concerning a ship's rigger injured while testing booms and so in the category of a shoreside specialist not entitled to a seaman's rights as established by this Court in *Sieracki* v. *Seas Shipping Co.*, 328 U. S. 85, points up the error below in relating longshoremen to the limited rights and remedies of repairmen rather than to the extended rights of seamen. This error was referred to in the petitions for rehearing, resulting in the revised opinion citing *Berti* and *Halecki, supra,* in support of the same erroneous conclusion against petitioner.

Of course *Halecki, supra,* finding liability on the failure of the shipowner to provide adequate ventilation for a shipcleaner, in the lesser maritime category than a longshoreman, supports petitioner's position. As with carbon tetrachloride in *Halecki, supra,* it was for the jury in the instant case on carbon monoxide poisoning to determine whether the shipowner failed in an affirmative duty to prevent or reduce a condition of air contamination caused by the known use of hilos in a partially covered hold. This

affirmative duty arises as much from constructive notice as actual notice. To hold otherwise would encourage shipowners to ignore dangerous conditions, to limit their safety inspections during cargo operations, and impose on the injured longshoreman the heavier burden of proving actual notice, which was denied here, though the danger was clearly foreseeable and extended for a substantial time after the second hilo commenced operation.

3. It is apparent that the "new curiosities" in the instant case include strained reasons to support an underlying premise against jury verdicts for longshoremen. There is an unjustified concern that in determining questions of negligence juries will fall short of a fair performance of their Constitutional function. It is for the jury to determine the shipowner's breach of duty to exercise reasonable care. To limit the jury's consideration of negligence by excluding an instruction on constructive notice, a concept engrained in our law and never before so challenged, is to preclude the assertion of the community's sense of values. Issues on lack of care and due diligence, sounding in negligence, are better understood and more forcefully applied than the separate and strict warranty of seaworthiness where there is no need to prove due diligence, notice or fault.

Inconsistently the opinion below concedes substantial proof in the record of an unsafe place to work overlapping unseaworthiness, and ignores the multiple stipulations and concessions by respondent's counsel during the trial and in its brief on appeal, to reverse a unanimous general jury's verdict sought by the parties.

4. Again underestimating the jury's capacity to understand, the Court of Appeals states there would be a con-

fusion of the issue between petitioner and the shipowner to instruct on the pertinent standards of safety promulgated by the Secretary of Labor, pursuant to Congressional authority and set forth in the Safety and Health Regulations for Longshoring. It cannot be proper for the same jurors to blindfold themselves and narrowly consider these regulations as offered by respondent on its claim over against the stevedore. As the 4th Circuit Court of Appeals stated in *Provenza, supra,* at page 665 of 324 F. 2d, "Nevertheless, if the violation of the regulations by the stevedore created a dangerous condition then the law is clear that the shipowner is in turn also liable. . . ."

There is obvious conflict on the use of safety regulations during trial between the Court of Appeals for the 2nd Circuit and the 4th Circuit Court of Appeals in *Provenza, supra.*

This learned Court has not yet passed on the Safety and Health Regulations for Longshoring as they may apply to maritime cases. The safety regulations are pertinent to all future maritime trials, and a definitive ruling by this Court to establish uniformity is required and needed by all Courts passing on maritime negligence cases. The continued vitality of *Kernan* v. *American Dredging Co.*, 355 U. S. 426, and the analogous *Federal Safety Appliance Act,* 45 U. S. C. A. 1-16, in their application to this issue, should also be considered. Cf. *Myers* v. *Reading Co.*, 331 U. S. 477.

CONCLUSION

Reason and the cases cited unequivocally support petitioner's contention that here is a compelling need for this learned Court to express the law as it should be on maritime negligence and the use of safety regulations during trial, so that all future maritime cases will be resolved on the law expressed by the Supreme Court and not by the "curiosities" in the opinion below.

Respectfully submitted,

PHILIP F. DiCOSTANZO
Attorney for Petitioner

Dated: Brooklyn, New York
1965.

ROBERT KLONSKY
On Petition

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APPENDIX A

Safety and Health Regulations for Longshoring (29 C. F. R. Sec. 9.1 *et seq.*), promulgated by the Secretary of Labor under the authority of Public Law 85-742, 72 Stat. 835, 33 U. S. C. A. Sec. 941 *et seq.*

§ 9.1 PURPOSE AND AUTHORITY

(a) The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U.S.C. 901 et seq.) provides compensation for injuries suffered by employees when they

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are working for private employers within the Federal maritime jurisdiction on the navigable waters of the United States, including dry docks. Public Law 85-742, 72 Stat. 835, approved August 23, 1958, which amends section 41 of the Longshoremen's and Harbor Workers' Compensation Act, as amended (44 Stat. 1444; 33 U.S.C. 941) requires, among other things, that every employer of the aforementioned employees "shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees." It is the purpose of the regulations of this part to carry out the intent of Public Law 85-742.

(b) Pursuant to Public Law 85-742 the regulations of this part do not make determinations with respect to matters under the control of the United States Coast Guard within the scope of Title 52 of the Revised Statutes and

Appendix A

Acts supplementary or amendatory thereto (46 U.S.C. 1-1388, passim), including, but not restricted to, the master, ship's officers, crew members, design, construction, and maintenance of the vessel, its gear and equipment; to matters within the regulatory authority of the United States Coast Guard to safeguard vessels, harbors, ports, and waterfront facilities under the provisions of the Espionage Act of June 15, 1917, as amended (40 Stat. 220; 50 U.S.C. 191 et seq.; 22 U.S.C. et seq.) or to matters within the regulatory authority of the United States Coast Guard with respect to lights, warning devices, safety equipment and other matters relating to the promotion of safety of lives and property under section 4(e) of the Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462; 43 U.S.C. 1333).

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§ 9.2 Scope and Responsibility

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in section 9.3(c) of this part.

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from reponsibilities or duties now placed upon them by law, regulation or custom.

* * *

§ 9.3 Definitions

(c) The term "employer" means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments as defined

herein within the Federal maritime jurisdiction on the navigable waters of the United States.

(d) The term "employee" means any longshoreman, or other person engaged in longshoring operations or related employments, within the federal maritime jurisdiction on the navigable waters of the United States, other than the master, ship's officers, crew of the vessel, or any person engaged by the master to load or unload any vessel under 18 net tons.

• • •

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§ 9.93 Ventilation and Atmospheric Conditions.

(a) When internal combustion engines exhaust into the hold or intermediate deck, and neither natural ventilation nor the ship's ventilating system is adequate to keep the carbon monoxide content of the atmosphere in the hold or intermediate deck below 100 parts per million, the employer shall use blowers sufficient in size and number and so arranged as to do so. The intakes of blowers shall be adequately guarded by screens.

(c) Before employees are permitted to enter or work in stowage spaces or tanks in which explosive, poisonous, noxious or gaseous cargoes have been carried or are stowed, or in which dry ice has been used as a refrigerant, or which have been fumigated, or in which there is a possibility of oxygen deficiency, the employer shall ascertain from the officer in charge of the vessel the conditions of the work place with respect to atmospheric contaminants.

(d) When it is ascertained from the officer in charge of the vessel that the atmosphere in which employees would be working is immediately dangerous to life, or if the

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atmosphere becomes immediately dangerous to life during cargo handling operations, no employee shall be permitted to enter or remain in the work place until the atmospheric condition has been made safe. Atmospheres immediately dangerous to life are those which contain less than 16.5 percent oxygen, or which by reason of the high toxicity of the contaminant, as in fumigation, or the high concentration of contaminants, as with carbon dioxide, would endanger the life of a person breathing them for even a short period of time.

(e) When it is ascertained from the officer in charge of the vessel that the atmosphere in which employees would be working contains gaseous contaminants not immediately dangerous to life, or if the atmosphere becomes so contaminated during cargo handling operations, no employee shall be permitted to enter or remain in the work place until the atmosphere is made safe, or the employees are protected by suitable respiratory protective equipment in accordance with the requirements of § 9.102 (a) and (b). Gaseous contaminants not immediately dangerous to life are gases present in concentrations that could be breathed for a short period without endangering the life of a person breathing them, but which might produce discomfort and possible injury after a prolonged single exposure or repeated short exposures.

* * *

APPENDIX B

Revised Opinion of June 15, 1965

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 212—September Term, 1964.

(Argued December 3, 1964
Revised opinion filed June 15, 1965.)

Docket No. 29155

ANTHONY ALBANESE,

Plaintiff-Appellee,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

FRIENDLY and SMITH, *Circuit Judges*, and
BLUMENFELD, *District Judge.**

* Sitting by designation.

Appendix B

Revised Opinion

Appeal by shipowner, defendant and third party plaintiff, from judgment entered on verdict after trial to the

—96a—

jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* in favor of plaintiff longshoreman to recover $145,000 damages, and in favor of stevedore, third party defendant.

Reversed and remanded.

ROBERT KLONSKY, New York, N. Y. (Philip F. DiCostanzo, New York, N. Y., on the brief), *for plaintiff-appellee.*

EDMUND F. LAMB, New York, N. Y. (Purdy, Lamb & Catoggio, of counsel to Schaffner & Furey, on the brief), *for defendant-appellant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Alexander, Ash & Schwartz and Sidney A. Schwartz, New York, N. Y., on the brief), *for third-party defendant-appellee.*

SMITH, *Circuit Judge*:

Albanese, a longshoreman in the employ of stevedore International Terminal Operating Co., Inc., injured by monoxide gas fumes while working in the hold of the vessel M.S. Schiedyk, owned by N.V. Nederl., brought action for damages against the shipowner, which impleaded I. T. O. as third party defendant. After trial to the jury in the United States District Court for the Southern District of

Appendix B

New York, Irving Ben Cooper, *Judge*, judgment was entered on verdict in favor of plaintiff against N.V. Nederl. and in favor of the stevedore dismissing the third party complaint, and N.V. Nederl. appeals. We find error in the charge on the principal action and on the claim over, and reverse and remand for new trial.

—97a—

Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the Schiedyk. From 8:00 a.m. to 10:45 a.m. on the day of plaintiff's injury a gasoline powered hilo owned by I. T. O. was working in this hold. About 10:45 a.m. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was party covered with hatch boards. I. T. O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that about 10 or 15 minutes after the second gang entered the hold, men complained of fumes from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed some time between 11:15 and 11:30 a.m. the blowers had not been turned on and the men left the hatch.

If the hatch bosses some time between 10:55 a.m. and 11:05 a.m. asked a ship's officer to turn on the ship's ven-

tilating system and he agreed to do so, a finding of defendant's negligence would be justified. The charge, however, allowed the jury also to find against the defendant on the basis of negligence (as distinguished from unseaworthiness) even if it did not have actual knowledge of an unsafe condition in the hold, if the jury determined that such a

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condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to prevent injury. This was erroneous, for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that the actively supervise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist. As pointed out in *Berti* v. *Compagnie de Navigation, etc.*, 213 F. 2d 397, 2 Cir. 1954, to lay down a contrary rule, which on the facts here would mean that mere knowledge of the use of hilos would create a duty on the part of the owner to turn on the ventilators even though he had no knowledge that the hold had become an unsafe place to work, would be to confuse the concept of unseaworthiness with that of negligence. Cf. *Filipek* v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734, 737, 2 Cir. 1958, cert. den. 359 U. S. 927. Contrast *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, 282 F. 2d 137, 2 Cir. 1960, 302 F. 2d 840, 2 Cir. 1962, where the shipowners themselves required the use of the deadly cleaning agent and were held under a duty of care in selecting competent contractors to work with it, or supervising its use.

The jury had been instructed that the owner would be liable, with or without knowledge, if the ship had become unseaworthy because of a dangerous condition created by

noxious fumes in the hold. This was correct, and if the verdict was reached on this theory, the verdict against the owner would be sustained, if the trial was otherwise free from error. However, the erroneous charge on negligence may have been the basis of the verdict. The jury's attention was directed in the charge to negligence in the

—99a—

absence of actual notice. Liability, if present in the absence of knowledge in this case, is based not on a duty of care, but on absolute liability for unseaworthiness, actual unfitness of the vessel for the use to which it is being put. Unfortunately, we cannot tell from the general verdict whether it was based on a finding of unseaworthiness, on a finding of failure to turn on the ventilators after agreeing to do so, or on the erroneous charge on constructive notice as a basis for a finding of lack of care. On the issue of whether an unsafe condition in fact existed, there was evidence of the men's complaints, and of course of plaintiff's injury. This might well have supported a verdict based on unseaworthiness. However, we do not find this evidence so plainly determinative of the issue that it required such a verdict. We cannot, therefore, ignore the instructions on negligence and direct a verdict for plaintiff on the ground of unseaworthiness. In view of the alternative claims here, special interrogatories to the jury might have been helpful in determining the basis of the verdict and the court may well consider their use on retrial.

Another claimed error is the charge that no contributory negligence on the part of the plaintiff had been shown. While the better practice is to let this question go to the jury, *LaGuerra* v. *Brasileiro*, 124 F. 2d 553, 2 Cir. 1942, we cannot say that the ruling was error in the circumstances of this case where evidence was lacking that Albanese knew

of the complaints or appreciated the danger on the day of his injury, or indeed had any real choice of action if he had. There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the excluding clause of

§9.2(b)[1] and the lack of any testimony as to what the concentration of carbon monoxide in the hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached.

We find error also in the instructions on the claim over. The jury could certainly find that the stevedore did not fulfill his duty of workmanlike service under his warranty to the owner in permitting the men to continue work in the hold after the stevedore had notice of the conditions in the hold, had requested the blowers to be turned on and the request was not promptly complied with. *Nicroli* v. *Den*

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[1] §9.2 Scope and Responsibility

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in section 9.3(c) of this part.

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

Norske, 332 F. 2d 651, 656, 2 Cir. 1964. The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error. *Misurella* v. *Isthmian Lines*, 328 F. 2d 40, 2 Cir. 1964. Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough. *Misurella, supra. Weyerhaeuser SS Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, 567. There was no evidence of active "hindrance" by the ship. I. T. O. could either have ordered the men out of the hold when it discovered that conditions were becoming dangerous and the ship's blowers were not turned on, or it could have used its own portable blowers.

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The judgment is set aside, on both the complaint and the claim over, and the case is remanded to the District Court for trial.

APPENDIX C

Original Opinion of April 9, 1965

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 212—September Term, 1964.

(Argued December 3, 1964 Decided April 9, 1965.)

Docket No. 29155

ANTHONY ALBANESE,

Plaintiff-Appellee,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

FRIENDLY and SMITH, *Circuit Judges,* and BLUMENFELD, *District Judge.**

Appendix C

Appeal by shipowner, defendant and third party plaintiff, from judgment entered on verdict after trial to the jury in the United States District Court for the Southern District

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of New York, Irving Ben Cooper, *Judge*, in favor of plaintiff longshoreman to recover $145,000 damages, and in favor of stevedore, third party defendant.

Reversed and remanded.

ROBERT KLONSKY, New York, N. Y. (Philip F. DiCostanzo, New York, N. Y., on the brief), *for plaintiff-appellee.*

EDMUND F. LAMB, New York, N. Y. (Purdy, Lamb & Catoggio, of counsel to Schaffner and Furey, on the brief), *for defendant-appellant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Alexander, Ash & Schwartz, and Sidney A. Schwartz, New York, N. Y., on the brief), *for third-party defendant-appellee.*

SMITH, *Circuit Judge*:

Albanese, a longshoreman in the employ of stevedore International Terminal Operating Co., Inc., injured by monoxide gas fumes while working in the hold of the vessel M. S. Schiedyk, owned by N. V. Nederl., brought action for damages against the shipowner, which impleaded I. T. O. as third party defendant. After trial to the jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*, judgment was entered on verdict in favor of plaintiff against N. V. Nederl. and

in favor of the stevedore dismissing the third party complaint, and N. V. Nederl. appeals. We find error in the charge on the principal action and on the claim over, and reverse and remand for new trial.

—44a—

Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the Schiedyk. From 8:00 a.m. to 10:45 a.m. on the day of plaintiff's injury a gasoline powered hilo owned by I. T. O. was working in this hold. About 10:45 a.m. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was partly covered with hatch boards. I. T. O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that about 10 or 15 minutes after the second gang entered the hold, men complained of fumes from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed sometime between 11:15 and 11:30 a.m. the blowers had not been turned on and the men left the hatch.

On this state of the proof we should have no difficulty in upholding the verdict for the plaintiff had the charge properly placed the issues before the jury, for if the hatch

bosses sometime between 10:55 a.m. and 11:05 a.m. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so, a finding of defendant's negligence would be justified. The charge, however, allowed the jury also to find the defendant negligent even if it did not have actual knowledge of an unsafe condition in the hold, if the

—45a—

jury determined that such a condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to prevent injury. This was erroneous, for a shipowner who hires a qualified stevedore to load the vessel is not bound to any duty of active supervision of the stevedore's work. *Filipek* v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734, 737, 2 Cir. 1958, cert. den. 359 U. S. 927, and if the owner had no actual notice that hilos were in use in the holds it would have no duty to turn on the ventilating equipment if the request to do so had not in fact been made. If the owner had such a duty of supervision, the mere use of the hilos in the hold might require his turning on the ventilators, to prevent a dangerous accumulation, even though the hold had not yet become an unfit place to work.

The jury had been instructed that the owner would be liable, with or without knowledge, if the ship had become unseaworthy because of a dangerous condition created by noxious fumes in the hold. This was correct, and if the verdict was reached on this theory, the verdict against the owner would be sustained, if the trial was otherwise free from error. However, the erroneous charge on negligence may have been the basis of the verdict. The jury's attention was directed in the charge to negligence in the absence of actual notice. Liability, if present in the absence

of knowledge in this case, is based not on a duty of care, but on absolute liability for unseaworthiness, actual unfitness of the vessel for the use to which it is being put. Unfortunately, we cannot tell from the general verdict whether it was based on a finding of unseaworthiness, on a finding of failure to turn on the ventilators after agreeing to do so, or on the erroneous charge on constructive notice as a basis for a finding of lack of care. On the issue

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of whether an unsafe condition in fact existed, there was evidence of the men's complaints, and of couse of plaintiff's injury. This might well have supported a verdict based on unseaworthiness. However, we do not find this evidence so plainly determinative of the issue that it required such a verdict. We cannot, therefore, ignore the instructions on negligence and direct a verdict for plaintiff on the ground of unseaworthiness. In view of the alternative claims here, special interrogatories to the jury might have been helpful in determining the basis of the verdict and the court may well consider their use on retrial.

Another claimed error is the charge that no contributory negligence on the part of the plaintiff had been shown. While the better practice is to let this question go to the jury, *LaGuerra* v. *Brasileiro,* 124 F. 2d 553, 2 Cir. 1942, we cannot say that the ruling was error in the circumstances of this case where evidence was lacking that Albanese knew of the complaints or appreciated the danger on the day of his injury, or indeed had any real choice of action if he had. There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the

excluding clause of §9.2(b)[1] and the lack of any testimony as to what the concentration of carbon monoxide in the

—47a—

hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached.

We find error also in the instructions on the claim over. The jury could certainly find that the stevedore did not fulfill his duty of workmanlike service under his warranty to the owner in permitting the men to continue work in the hold after the stevedore had notice of the conditions in the hold, had requested the blowers to be turned on and the request was not promptly complied with. *Nicroli* v. *Den Norske*, 332 F. 2d 651, 656, 2 Cir. 1964. The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error. *Misurella* v. *Isthmian Lines*, 328 F. 2d 40, 2 Cir. 1964. Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the

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[1] §9.2 Scope and Responsibility

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in section 9.3(c) of this part.

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least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough. *Misurella, supra. Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, 567. There was no evidence of active "hindrance" by the ship. I. T. O. could either have ordered the men out of the hold when it discovered that conditions were becoming dangerous and the ship's blowers were not turned on, or it could have used its own portable blowers.

The judgment is set aside, on both the complaint and the claim over, and the case is remanded to the District Court for trial.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of June one thousand nine hundred and sixty-five.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

HON. M. JOSEPH BLUMENFELD,
District Judge.

ANTHONY ALBANESE,
Plaintiff-Appellee,

—v.—

N.V. NEDERL. AMERIK STOOMV. MAATS.,
Defendant and
Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Appendix D

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed on both the complaint and the claim over and that the action be and it hereby is remanded to said District Court for a new trial in accordance with the opinion of this Court with costs to defendant-appellant.

A. DANIEL FUSARO
Clerk

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 10 1965
JOHN F. DAVIS, CLERK

No. 557

Supreme Court of the United States

October Term, 1965

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

—and—

ANTHONY ALBANESE,

Co-Petitioner,

—against—

N.V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

PETITION OF INTERNATIONAL TERMINAL OPERATING CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY A. SCHWARTZ
Attorney for Petitioner
76 Beaver Street
New York 5, New York
212 WH 4-2633

JOSEPH ARTHUR COHEN
On Petition

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Respondent.

PETITION OF INTERNATIONAL TERMINAL OPERATING CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, International Terminal Operating Co., Inc., prays that a writ of certiorari issue to review the revised decision and judgment of the United States Court of Appeals for the Second Circuit, entered June 15, 1965, and the denial of a petition for a rehearing and rehearing *in banc,* filed June 15, 1965 with the revised opinion, which reverses a final judgment entered in accordance with a general jury verdict in the United States District Court for the Southern District of New York on April 17, 1964 dismissing Respondent's third-party complaint against Petitioner.

Citations to Opinions Below

The District Court (Hon. Irving Ben Cooper) delivered no written opinion, but its judgment entered on a jury verdict is printed as Appendix A hereto.

The initial opinion of the Court of Appeals of April 9, 1965 is unreported, and is printed as Appendix B hereto.

The revised opinion of the Court of Appeals filed June 15, 1965 is reported officially at 346 F. 2d 481, and is printed as Appendix C hereto. The judgment of the Court of Appeals entered June 15, 1965 is printed as Appendix D hereto.

Jurisdiction

On April 9, 1965, judgment was initially entered in the United States Court of Appeals. A timely petition for rehearing and rehearing *in banc* was filed on April 22, 1965. Such petition was denied and a revised opinion and judgment were entered on June 15, 1965 (Tr. 91a-102a).

This petition for a writ of certiorari is filed within 90 days after the denial of the petition for rehearing and the entry of judgment on June 15, 1965.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

(1) In reversing a jury verdict which exonerated Petitioner from Respondent's claim for indemnity, did the Court of Appeals deprive Petitioner of its constitutionally guaranteed rights of due process and trial by jury by predicating reversal solely on an alleged erroneous charge which the record discloses was not given?

(2) Where a stevedore complained to a ship's officer as soon as a dangerous condition was known or should reasonably have been known, and where the ship's officer directed the stevedore to continue working under the dangerous condition with the added assurance that he would promptly and entirely eliminate the dangerous condition, and where the stevedore complies, then

(a) can the stevedore be said to have breached its implied warranty of workmanlike service to the shipowner as it is performing only as specifically requested by the shipowner; and

(b) is not the shipowner guilty of "conduct on its part sufficient to preclude recovery" of indemnity in accordance with the opinion of this Honorable Court in *Weyerhaeuser* v. *Nacirema Operating Co.*, 355 U. S. 563, 567?

(3) Precisely what does this Court mean by "conduct on its part sufficient to preclude recovery," and what yardsticks are to be applied by inferior courts in resolving that issue?

Constitutional Provisions Involved

UNITED STATES CONSTITUTION, AMEND. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMEND. VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Statement of the Case

The instant action presents the familiar tripartite situation of a longshoreman suing a shipowner for personal injuries sustained aboard ship, with the shipowner in turn impleading the plaintiff's stevedore employer seeking full indemnity. Federal jurisdiction is predicated upon the diversity of citizenship between the plaintiff-longshoreman (New Jersey) and the defendant-shipowner (The Netherlands) with the amount in issue exceeding $10,000.00 exclusive of interest and costs.

On February 25, 1961, Petitioner was engaged in loading steel sheets and tinplate into the #2 hold of Respondent's vessel, the M. S. Schiedyk. One of the longshoremen employed by Petitioner in performing that work was the co-petitioner and plaintiff herein, Anthony Albanese. As is perfectly normal and customary in this type of stevedoring operation, small gasoline powered vehicles known as hi-los were used by the longshoremen to help move and manipulate the heavy cargo being stowed. Naturally, these vehicles emitted some carbon monoxide in their exhaust fumes as do all such motor vehicles.

The vessel was equipped with a Cargocaire ventilating system with an air moving and changing capacity of 6000 cubic feet per minute. Although this system, under the Respondent-shipowner's exclusive possession and control, was not turned on at the beginning of the loading operation, there was undisputed testimony that the natural ventilation of the hatch and cowl openings usually suffice to remove whatever exhaust fumes are emitted by hi-los (Vol. III, App. to 3rd Party-Defendant-Appellee's brief, pp. 30a-38a). As carbon monoxide is lighter than air, the adequacy of natural ventilation in many instances is not at all surprising.

There was a unanimity of testimony from both the longshoremen and Respondent-shipowner's personnel that up until at least 10:45 A.M. the working conditions in the hatch were normal, the atmosphere in the hatch was clean with no hovering clouds of smoke or fumes, and the work was proceeding steadily and peacefully, without complaint, difficulty or incident (Vol. III, App. to 3rd Party-Defendant-Appellee's brief, pp. 1a, 13a, 15a, 19a-20a, 24a, 38a-40a).

At approximately 10:45 A.M. a second gang of longshoremen started to work on another deck in the same hatch, using a second hi-lo. After the second hi-lo was in operation for approximately 20 minutes, the longshoremen began to complain of smoke and fumes in the hold and requested a ship's officer to turn on the vessel's Cargocaire ventilating system (Vol. III, App. to 3rd Party-Defendant-Appellee's brief, pp. 3a-6a, and 8a-12a). The vessel's mate assured both the longshoremen's hatch boss and the gangwayman that he would turn on the vessel's Cargocaire system, and he ordered them to continue working (*ibid.*). In reliance upon such assurance, and in re-

sponse to such order, the longshoremen did continue working.

After continuing at work for a few minutes, the hatch boss realized that the ship's officer had not turned on the Cargocaire system as promised, and he again climbed out of the hold to find such officer and ascertain what was happening. Unable to find the officer after a few moments of search, the hatch boss returned to the hold and ordered all the longshoremen to quit work and come up. The plaintiff was overcome in the process of leaving the hold (Vol. III, App. to 3rd Party-Defendant-Appellee's brief, pp. 9a-12a).

Indeed, although the Respondent-shipowner conceded on page 5 of its brief on appeal:

> "For the purposes of this appeal it is, of course, assumed that the request to a mate to put on the ship's ventilating system, his promise to do so and request that the men keep working, is an established fact.",

both the initial and revised opinion of the Court of Appeals state merely:

> "There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on."

The Trial Judge's charge to the jury on the issues involved in Respondent-shipowner's claim for indemnity against your Petitioner occupies slightly less than four printed pages (Vol. III, 81a-84a). Approximately three and one-half of those pages advised the jury of your Petitioner's obligation to perform its services in a workman-

like manner and of what would constitute a breach of that obligation. Then, in two relative short paragraphs, the Trial Judge disposes of the issue of indemnity defeating conduct on the part of the shipowner as follows:

> "But equally important is this proposition of law; that if on the other hand you find that the stevedore company acted with reasonable promptness to protect its men upon learning of the danger and was hindered by the ship's officers, then you must find that the stevedore did not breach its warranty.
>
> *Should you find that complaints were made to a ship's officer as soon as the dangerous condition was known or should reasonably have been known by the stevedore, and if you find that the ship's officer directed or requested the longshoremen to continue working under these conditions with the added assurance that the dangerous condition would be promptly and entirely eliminated, then you may find that the stevedore acted to protect its men; and, in that event, the shipowner is not entitled to recover indemnity.* (Italics added.)

Obviously, as is conceded by the Respondent-shipowner, the jury believed the testimony that the hatch boss and gangwayman timely complained to a ship's officer about the atmosphere in the hold; were assured by the ship's officer that he would rectify the situation by turning on the vessel's Cargocaire ventilating system, were directed by the ship's officer to continue at work, and following such directions and relying upon such assurances did in fact continue at work for a few more moments until it appeared that the ship's officer had not turned on the ventilating system as promised.

The only error, assigned by the Court of Appeals in both the initial and revised opinions for reversing this jury verdict and remanding the claim over for a new trial, was:

> "The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error."

However, no such charge was given. And, under the charge actually given, as reflected by the record and above quoted, the jury had to find far more than a mere request on the part of the Stevedore to the Shipowner to turn on the blowers in order to exonerate or absolve the Stevedore herein. Under the charge actually given, in order to absolve or exonerate the Stevedore the jury was required to find (1) that the Stevedore made complaints to a ship's officer as soon as it knew or should have reasonably known of the dangerous condition, (2) that the ship's officer directed or requested the longshoremen to continue working under the dangerous conditions complained of, and (3) that the ship's officer gave assurance that he would rectify the condition. And the jury was instructed that upon such fact findings, it may (permissively, not mandatorily) find the shipowner not entitled to recover indemnity.

This difference between the charge actually given, as reflected by the record, and the erroneous charge which the Court of Appeals felt warranted a reversal but which the record discloses was not in fact given, was pointed out to the Court of Appeals in your Petitioner's petition for rehearing and rehearing *in banc*. This was all to no avail as the Court's of Appeals revised opinion was verbatim identical to its initial opinion insofar as the claim for indemnity was concerned.

In reversing a jury verdict on the basis of an erroneous charge which the record discloses never to have been given,

and in ignoring the actual record, the most respected Court of Appeals committed grave errors far transcending in importance this individual case and worthy of consideration by this Honorable Court.

Reasons for Granting the Writ

1. *The importance of the Questions Presented*

This Court has had occasion to classify "fair play" as the very essence of due process, *Galvin* v. *Press,* 347 U. S. 522, 530 (1954); and has held a misreading of the record, whether by carelessness or design, to be inconsistent with due process of law, *Townsend* v. *Burke,* 334 U. S. 736, 740-1 (1948). It is the very antithesis of fair play for an appellate court to reverse a jury verdict for an alleged erroneous charge which the record discloses never to have been given. Appellate importation of error to the record is at once a violation of our fundamental concepts of justice.

Petitioner's constitutionally guaranteed right of due process has thus been violated by the reversal of the favorable jury verdict following a lengthy trial on the merits on the basis of an alleged error which can, at best, only be due to a misreading of the record.

Further, the factual issues between Petitioner and Respondent having once been litigated at length before a jury, the reversal of such jury verdict on the basis of a non-existent error and a remand of the same factual issues for another trial impinges upon Petitioner's right to trial by jury. The action of the Court of Appeals in requiring another court to re-examine those same factual issues in this case violates the protection guaranteed your Petitioner by the Seventh Amendment to the United States Constitution.

Important as such deprivations of constitutionally guaranteed rights are in and of themselves, they are of even greater importance by reason of the fact that they occur in the sensitive field of maritime indemnity and were committed by the Court of Appeals of the Second Circuit. Territorially embracing the largest port in the country, the decisions of the Court of Appeals for the Second Circuit in this field are given somewhat more than usual weight and frequently set a nationwide pattern. When that court, in its leapfrogging zeal to implement a mistaken conception of law, transgresses civil rights, a long step has been taken to make stevedores legal pariahs-outcasts at law. Such action should not go unheeded or unchecked by this Honorable Court.

The indemnity action of the Respondent-shipowner was successfully defended by the Petitioner-stevedore on the basis that (a) it was acting only as expressely directed by Respondent-shipowner and hence could not be guilty of a breach of warranty, and (b) the Respondent-shipowner's directions to continue at work with assurances that the dangerous condition would be completely and entirely eliminated constituted "conduct sufficient to preclude recovery" of indemnity. The jury obviously believed the facts to be as contended by your Petitioner, and Respondent has conceded that such facts must be accepted as true for the purposes of the appeal. Accordingly, the decision herein of the Court of Appeals can only be construed as notice to the stevedoring industry that they will be responsible at law to their customers (shipowners) for doing exactly what their customers direct them to do. Obviously then, the stevedore is being urged by the Court of Appeals to render performance contrary to the manner directed by the shipowner. Such action by a stevedore, or by any party to its contractual privy, subjects that party to a lawsuit for breach of contract and loss of a customer.

Liable if it does, and liable if it doesn't, the stevedore is being judicially located between Scylla and Charybidis. Research discloses no other industry which can be held liable for breach of warranty only for doing precisely what the warrantee orders. Indeed, the general common law appears to be quite to the contrary. See, e.g., *Corbin on Contracts,* Sections 571, 947 and 1264; *Restatement of Contracts,* Sections 295 and 315; *New York Uniform Commercial Code,* Section 2-316.

The importance to the stevedoring industry of obtaining a definitive opinion from this Honorable Court of the extent of the implied warranty of workmanlike service, and the yardsticks to be applied in determining what conduct precludes indemnity, can not be minimized. Contractual sanity and the disposition of many pending cases in this field, with many more to come, call for this Honorable Court's consideration of the issues here involved.

2. *The instant decision is in conflict with holdings and principles enunciated by this Court*

The question of whether a stevedore rendered substandard performance, and the question of whether a shipowner's conduct precludes indemnity, have been held by this Court to be questions of fact for determination by the jury, *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958). Indeed, "the federal policy favoring jury decisions of disputed fact questions" stems from "the influence—if not the command—of the Seventh Amendment," *Byrd* v. *Blue Ridge Rural Electric Cooperative,* 356 U. S. 525, 537-8 (1958).

In *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines,* 369 U. S. 355 (1962), this Court clearly indicated that an appellate search for the one possible view of a case that

would void a jury verdict is improper. In improperly straining itself to search for the one view of the case which would void the verdict, even to the extent of importing error where the record shows none to have existed, the Court of Appeals has taken an approach completely contrary to the principles enunciated by this Court and, in addition to being violative of the Seventh Amendment, is destructive of our entire jurisprudential system.

Indeed, the burning desire of the Court of Appeals for the Second Circuit to usurp for itself the function of the jury and to impose liability upon marine contractors has now culminated in its affirmance of a directed verdict on the very issues which this Court stated were for jury determination, see *Mortensen v. A/S Glittre*, (2nd Cir., decided July 8, 1965, Docket #28871). In that case, it was decided that the plaintiff's admitted prior knowledge of an oil slick on deck constituted, *as a matter of law*, a breach of his employer's implied warranty of workmanlike service; and, *again as a matter of law*, that the creation of that dangerous condition by the shipowner did not constitute indemnity defeating conduct.

Contrast *Mortensen, supra*, with this Court's approach in *Weyerhaueser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958), where notwithstanding that the stevedore *created* the dangerous condition, this Court ruled that the issues of breach of warranty and indemnity defeating conduct were for the jury to resolve as *issues of fact*.

The supplanting of a jury by an appellate court is an invidious legal cancer which must be treated by this Court before it is completely metastasized.

3. *The instant decision by the Court of Appeals for the Second Circuit is in conflict with decisions of other Courts of Appeals on the same matter, and is, indeed, in conflict with its own earlier decision*

Bearing in mind that the Respondent-shipowner conceded on page 5 of its brief on appeal that:

> "For the purposes of this appeal it is, of course, assumed that the request to a mate to put on the ship's ventilating system, his promise to do so and request that the men keep working, is an established fact.",

let us examine the results obtained in other Circuits under similar established facts.

The case of *Moore-McCormack Lines Inc.* v. *Maryland Ship Ceiling Co.*, 311 F. 2d 663 (4 Cir. 1962), is most apposite. In that case, two ship's ceilers or carpenters were overcome by noxious fumes from earlier cargo fumigation. When the ship ceilers started work they noticed a strong, unpleasant and peculiar odor emanating from the hold. They called the attention of the ship's officer to this odor and he assured them that it was not harmful and that it was all right for them to continue work. They entered the hold and thereafter became ill from the effects of hydrogen cyanide gas.

The jury verdict denied the shipowner indemnity from the plaintiff's employer. As here, the shipowner appealed from the Court's refusal to grant its motion for a directed verdict as against the ship ceiling company and argued in substance that having suspected that the conditions were dangerous the ship ceiling company rendered itself liable to indemnity when it sent its men into a condition of danger. The Court, however, found that such argument

took into account only a portion of the relevant facts and stated (p. 667 of 311 F. 2d):

> "It did not compel a directed verdict in favor of the shipowner. In summation, there was evidence from which a jury might find that the employees of the ship ceiling company were not negligent in attempting to do their work after receiving assurances from an officer of the ship that the condition was not dangerous."

And, on page 668 of 311 F. 2d, the Court further stated:

> *"We think that there was substantial evidence to support the ruling of the Judge and all the findings of the jury in this respect and that the facts of the case warrant the findings that the performance of the ship, in the language of the Supreme Court in the Weyerhaeuser case, 355 U. S. 563, 567, 78 S. Ct. 438, 440, amounted to 'conduct on its part sufficient to preclude recovery.'"* (Italics added.)

Similarly, the Court of Appeals for the Third Circuit has stated:

> "It was for the jury to determine whether it was unworkmanlike for the stevedoring company to continue operating the winch, which it knew had been defective, after receiving a categorical assurance from the shipowner's crew that it was 'O.K.' The same can be said for the shipowner's argument that the stevedoring company, even before the accident, knew that the winch was defective and that efforts at repair had been unsuccessful. At most, it can be said that these are questions over which reasonable men could differ, and that, as such, they were properly referred to the jury." *Hodgson* v. *Lloyd Brasileiro Patrimonis Nacional*, 294 F. 2d 32 (3rd Cir. 1961).

And, in *Torres Cruz* v. *Hudson Steamship Company*, 206 F. Supp. 216 (Puerto Rico), aff'd sub. nom. *Hudson Steamship Company* v. *Colon*, 314 F. 2d 44 (1st Cir. 1963); and *United States* v. *Harrison*, 245 F. 2d 911 (9th Cir. 1957), shipowner's directions to the stevedore to continue working under dangerous conditions, and shipowner's assurances of safety, were considered ample reason for denial of indemnity.

Thus, the instant decision by the Court of Appeals for the Second Circuit, based upon conceded facts, is directly in conflict with decisions from the First, Third, Fourth, and Ninth Circuits as above indicated.

Indeed, the instant decision appears to conflict with an earlier decision of the Second Circuit itself in *Misurella* v. *Isthmian Lines, Inc.*, 215 F. Supp. 857 (S. D. N. Y. 1963) aff'd 328 F. 2d 40 (2nd Cir. 1964). For, Judge Weinfeld there indicated (page 862 of 215 F. Supp.) that to avoid liability the stevedore should have insisted that the ship's officer turn on the ventilating equipment, or else should have ordered the men out of the hold. That was precisely what the stevedore did in the instant case, and the jury so found. Yet, the Court of Appeals reversed the verdict.

By reason of these inter and intra circuit conflicts, the instant case warrants review by this Court to definitively resolve these issues.

4. *The Courts themselves seek clarification of what this Court meant by "conduct on its part sufficient to preclude recovery" of indemnity in* Weyerhaeuser v. Nacirema Operating Co., *355 U. S. 563*

In *Misurella* v. *Isthmian Lines, Inc.*, 215 F. Supp. 857, 861, aff'd 328 F. 2d 40 (2nd Cir. 1964), so eminent a jurist as the Honorable Edward Weinfeld is heard to complain about this Court's opinion in the *Weyerhaeuser* case *supra:*

> "The Court did not there define just what conduct by a shipowner would preclude recovery, nor have subsequent cases distilled the essential elements necessary to bar such recovery."

Similarly, in *McNamara* v. *Weichsel Dampschifffahrts*, 293 F. 2d 900, 903 (2nd Cir. 1961), it is stated:

> "Pittston, having undertaken the stevedoring, was under a duty to perform it in a workmanlike manner. If it rendered substandard or improper service, Pittston would be under a duty to indemnify Weichsel for any liability imposed upon Weichsel as a result of such service. This obligation to indemnify may be nullified, however, if Weichsel's conduct was such as to preclude recovery. *The difficulty lies in determining what conduct is sufficient to defeat Weichsel's right of indemnity.*" (Italics added.)

Indeed, in the opinions in this very case, and subsequently in *Mortensen* v. *A/S Glittre, supra,* the Court of Appeals for the Second Circuit has reiterated its uncertainty as what type of conduct this Court meant to preclude indemnity. These requests for a legal yardstick and further clarification from the Court, entrusted with the determination of the majority of the maritime causes in this country, should not go ignored.

CONCLUSION

For the foregoing reasons, this petition for a writ of ceritorari should be granted.

September 3, 1965

Respectfully submitted,

SIDNEY A. SCHWARTZ
Attorney for Petitioner

JOSEPH ARTHUR COHEN
On Petition

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APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 1086

Judg. #66,581

ANTHONY ALBANESE,

Plaintiff,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant and 3rd Party Plaintiff,

—v.—

INTERNATIONAL TERMINAL OPERATING CO. INC.,

3rd Party Defendant.

The issues in the above entitled proceeding having been brought on regularly for trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury on April 7, 8, 9, 10, 13, 14, 15, 16, 1964, and the jury having rendered a verdict in favor of the plaintiff in the sum of $145,000.00 against the defendant, and also in favor of the third party defendant against the defendant, and the Court having granted defendant 20 days to file all motions and a new trial, it is

ADJUDGED that the plaintiff, Anthony Albanese have judgment against the defendant, N. V. Neder. Amerik Stoomv. Maats, in the sum of $145,000.00, and it is further

Appendix A

ADJUDGED that the third party defendant, International Terminal Operating Co. Inc., have judgment against the defendant, N. V. Nederl. Amerik Stoomv. Maats, dismissing the third party complaint.

Dated: New York, N. Y.
April 17, 1964.

JAMES E. VALECHE
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 212—September Term, 1964.

(Argued December 3, 1964 Decided April 9, 1965.)

Docket No. 29155

ANTHONY ALBANESE,

Plaintiff-Appellee,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

FRIENDLY and SMITH, *Circuit Judges,* and BLUMENFELD, *District Judge.**

Appeal by shipowner, defendant and third party plaintiff, from judgment entered on verdict after trial to the jury in the United States District Court for the Southern District

* Sitting by designation.

of New York, Irving Ben Cooper, *Judge*, in favor of plaintiff longshoreman to recover $145,000 damages, and in favor of stevedore, third party defendant.

Reversed and remanded.

ROBERT KLONSKY, New York, N. Y. (Philip F. DiCostanzo, New York, N. Y., on the brief), *for plaintiff-appellee.*

EDMUND F. LAMB, New York, N. Y. (Purdy, Lamb & Catoggio, of counsel to Schaffner and Furey, on the brief), *for defendant-appellant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Alexander, Ash & Schwartz, and Sidney A. Schwartz, New York, N. Y., on the brief), *for third-party defendant-appellee.*

SMITH, *Circuit Judge*:

Albanese, a longshoreman in the employ of stevedore International Terminal Operating Co., Inc., injured by monoxide gas fumes while working in the hold of the vessel M. S. Schiedyk, owned by N. V. Nederl., brought action for damages against the shipowner, which impleaded I. T. O. as third party defendant. After trial to the jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge*, judgment was entered on verdict in favor of plaintiff against N. V. Nederl. and in favor of the stevedore dismissing the third party complaint, and N. V. Nederl. appeals. We find error in the charge on the principal action and on the claim over, and reverse and remand for new trial.

Appendix B

Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the Schiedyk. From 8:00 a.m. to 10:45 a.m. on the day of plaintiff's injury a gasoline powered hilo owned by I. T. O. was working in this hold. About 10:45 a.m. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was partly covered with hatch boards. I. T. O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that about 10 or 15 minutes after the second gang entered the hold, men complained of fumes from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed sometime between 11:15 and 11:30 a.m. the blowers had not been turned on and the men left the hatch.

On this state of the proof we should have no difficulty in upholding the verdict for the plaintiff had the charge properly placed the issues before the jury, for if the hatch bosses sometime between 10:55 a.m. and 11:05 a.m. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so, a finding of defendant's negligence would be justified. The charge, however, allowed the jury also to find the defendant negligent even if it did not have actual knowledge of an unsafe condition in the hold, if the

jury determined that such a condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to prevent injury. This was erroneous, for a shipowner who hires a qualified stevedore to load the vessel is not bound to any duty of active supervision of the stevedore's work. *Filipek* v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734, 737, 2 Cir. 1958, cert. den. 359 U. S. 927, and if the owner had no actual notice that hilos were in use in the holds it would have no duty to turn on the ventilating equipment if the request to do so had not in fact been made. If the owner had such a duty of supervision, the mere use of the hilos in the hold might require his turning on the ventilators, to prevent a dangerous accumulation, even though the hold had not yet become an unfit place to work.

The jury had been instructed that the owner would be liable, with or without knowledge, if the ship had become unseaworthy because of a dangerous condition created by noxious fumes in the hold. This was correct, and if the verdict was reached on this theory, the verdict against the owner would be sustained, if the trial was otherwise free from error. However, the erroneous charge on negligence may have been the basis of the verdict. The jury's attention was directed in the charge to negligence in the absence of actual notice. Liability, if present in the absence of knowledge in this case, is based not on a duty of care, but on absolute liability for unseaworthiness, actual unfitness of the vessel for the use to which it is being put. Unfortunately, we cannot tell from the general verdict whether it was based on a finding of unseaworthiness, on a finding of failure to turn on the ventilators after agreeing to do so, or on the erroneous charge on constructive notice as a basis for a finding of lack of care. On the issue

of whether an unsafe condition in fact existed, there was evidence of the men's complaints, and of course of plaintiff's injury. This might well have supported a verdict based on unseaworthiness. However, we do not find this evidence so plainly determinative of the issue that it required such a verdict. We cannot, therefore, ignore the instructions on negligence and direct a verdict for plaintiff on the ground of unseaworthiness. In view of the alternative claims here, special interrogatories to the jury might have been helpful in determining the basis of the verdict and the court may well consider their use on retrial.

Another claimed error is the charge that no contributory negligence on the part of the plaintiff had been shown. While the better practice is to let this question go to the jury, *LaGuerra* v. *Brasileiro*, 124 F. 2d 553, 2 Cir. 1942, we cannot say that the ruling was error in the circumstances of this case where evidence was lacking that Albanese knew of the complaints or appreciated the danger on the day of his injury, or indeed had any real choice of action if he had. There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the excluding clause of §9.2(b)[1] and the lack of any testimony as to what the concentration of carbon monoxide in the

[1] §9.2 Scope and Responsibility

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in section 9.3(c) of this part.

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached.

We find error also in the instructions on the claim over. The jury could certainly find that the stevedore did not fulfill his duty of workmanlike service under his warranty to the owner in permitting the men to continue work in the hold after the stevedore had notice of the conditions in the hold, had requested the blowers to be turned on and the request was not promptly complied with. *Nicroli* v. *Den Norske,* 332 F. 2d 651, 656, 2 Cir. 1964. The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error. *Misurella* v. *Isthmian Lines,* 328 F. 2d 40, 2 Cir. 1964. Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough. *Misurella, supra. Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co., Inc.,* 355 U. S. 563, 567. There was no evidence of active "hindrance" by the ship. I. T. O. could either have ordered the men out of the hold when it discovered that conditions were becoming dangerous and the ship's blowers were not turned on, or it could have used its own portable blowers.

The judgment is set aside, on both the complaint and the claim over, and the case is remanded to the District Court for trial.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 212—September Term, 1964.

(Argued December 3, 1964
Revised opinion filed June 15, 1965.)

Docket No. 29155

ANTHONY ALBANESE,

Plaintiff-Appellee,

—v.—

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Defendant-Appellant and Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellee.

Before:

FRIENDLY and SMITH, *Circuit Judges*, and BLUMENFELD, *District Judge.**

* Sitting by designation.

Appendix C

Revised Opinion

Appeal by shipowner, defendant and third party plaintiff, from judgment entered on verdict after trial to the jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* in favor of plaintiff longshoreman to recover $145,000 damages, and in favor of stevedore, third party defendant.

Reversed and remanded.

ROBERT KLONSKY, New York, N. Y. (Philip F. DiCostanzo, New York, N. Y., on the brief), *for plaintiff-appellee.*

EDMUND F. LAMB, New York, N. Y. (Purdy, Lamb & Catoggio, of counsel to Schaffner & Furey, on the brief), *for defendant-appellant and third-party plaintiff-appellant.*

JOSEPH ARTHUR COHEN, New York, N. Y. (Alexander, Ash & Schwartz and Sidney A. Schwartz, New York, N. Y., on the brief), *for third-party defendant-appellee.*

SMITH, *Circuit Judge*:

Albanese, a longshoreman in the employ of stevedore International Terminal Operating Co., Inc., injured by monoxide gas fumes while working in the hold of the vessel M.S. Schiedyk, owned by N.V. Nederl., brought action for damages against the shipowner, which impleaded I. T. O. as third party defendant. After trial to the jury in the United States District Court for the Southern District of New York, Irving Ben Cooper, *Judge,* judgment was en-

tered on verdict in favor of plaintiff against N.V. Nederl. and in favor of the stevedore dismissing the third party complaint, and N.V. Nederl. appeals. We find error in the charge on the principal action and on the claim over, and reverse and remand for new trial.

Plaintiff was a member of a gang of longshoremen working in the lower No. 2 hold of the Schiedyk. From 8:00 a.m. to 10:45 a.m. on the day of plaintiff's injury a gasoline powered hilo owned by I. T. O. was working in this hold. About 10:45 a.m. a second gang began to work in the after half of the upper 'tween deck of No. 2 hold, employing a second hilo. The ship had a ventilating system often used when hilos were working in the holds, which was not turned on the day in question prior to plaintiff's injury. It was raining and a hatch tent partly covered the upper hatch opening. The hatch between the 'tween deck and the lower hold was partly covered with hatch boards. I. T. O. had portable blowers at the pier, none of which were in use at No. 2 hold. There was evidence that about 10 or 15 minutes after the second gang entered the hold, men complained of fumes from the hilos and the winch operator and signalman at the hatch asked a ship's officer to turn the blowers on. There was evidence that a few moments later the hatch boss told the ship's officer to turn the blowers on or the men would walk out, and that the ship's officer said to keep on working, that he would turn the blowers on. When Albanese collapsed some time between 11:15 and 11:30 a.m. the blowers had not been turned on and the men left the hatch.

If the hatch bosses some time between 10:55 a.m. and 11:05 a.m. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so, a finding of defendant's negligence would be justified. The charge, however,

allowed the jury also to find against the defendant on the basis of negligence (as distinguished from unseaworthiness) even if it did not have actual knowledge of an unsafe condition in the hold, if the jury determined that such a condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to prevent injury. This was erroneous; for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that he actively supervise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist. As pointed out in *Berti* v. *Compagnie de Navigation, etc.*, 213 F. 2d 397, 2 Cir. 1954, to lay down a contrary rule, which on the facts here would mean that mere knowledge of the use of hilos would create a duty on the part of the owner to turn on the ventilators even though he had no knowledge that the hold had become an unsafe place to work, would be to confuse the concept of unseaworthiness with that of negligence. Cf. *Filipek* v. *Moore-McCormack Lines, Inc.*, 258 F. 2d 734, 737, 2 Cir. 1958, cert. den. 359 U. S. 927. Contrast *Halecki* v. *United New York and New Jersey Sandy Hook Pilots Association*, 282 F. 2d 137, 2 Cir. 1960, 302 F. 2d 840, 2 Cir. 1962, where the shipowners themselves required the use of the deadly cleaning agent and were held under a duty of care in selecting competent contractors to work with it, or supervising its use.

The jury had been instructed that the owner would be liable, with or without knowledge, if the ship had become unseaworthy because of a dangerous condition created by noxious fumes in the hold. This was correct, and if the verdict was reached on this theory, the verdict against the owner would be sustained, if the trial was otherwise

free from error. However, the erroneous charge on negligence may have been the basis of the verdict. The jury's attention was directed in the charge to negligence in the absence of actual notice. Liability, if present in the absence of knowledge in this case, is based not on a duty of care, but on absolute liability for unseaworthiness, actual unfitness of the vessel for the use to which it is being put. Unfortunately, we cannot tell from the general verdict whether it was based on a finding of unseaworthiness, on a finding of failure to turn on the ventilators after agreeing to do so, or on the erroneous charge on constructive notice as a basis for a finding of lack of care. On the issue of whether an unsafe condition in fact existed, there was evidence of the men's complaints, and of course of plaintiff's injury. This might well have supported a verdict based on unseaworthiness. However, we do not find this evidence so plainly determinative of the issue that it required such a verdict. We cannot, therefore, ignore the instructions on negligence and direct a verdict for plaintiff on the ground of unseaworthiness. In view of the alternative claims here, special interrogatories to the jury might have been helpful in determining the basis of the verdict and the court may well consider their use on retrial.

Another claimed error is the charge that no contributory negligence on the part of the plaintiff had been shown. While the better practice is to let this question go to the jury, *LaGuerra* v. *Brasileiro,* 124 F. 2d 553, 2 Cir. 1942, we cannot say that the ruling was error in the circumstances of this case where evidence was lacking that Albanese knew of the complaints or appreciated the danger on the day of his injury, or indeed had any real choice of action if he had. There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the

Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the excluding clause of §9.2(b)[1] and the lack of any testimony as to what the concentration of carbon monoxide in the hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached.

We find error also in the instructions on the claim over. The jury could certainly find that the stevedore did not fulfill his duty of workmanlike service under his warranty to the owner in permitting the men to continue work in the hold after the stevedore had notice of the conditions in the hold, had requested the blowers to be turned on and the request was not promptly complied with. *Nicroli* v. *Den Norske,* 332 F. 2d 651, 656, 2 Cir. 1964. The instruction that the request to the ship's officer was sufficient to absolve the stevedore was error. *Misurella* v. *Isthmian Lines,* 328 F. 2d 40, 2 Cir. 1964. Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the war-

[1] §9.2 Scope and Responsibility

(a) The responsibility for compliance with the regulations of this part is placed upon "employers" as defined in section 9.3(c) of this part.

(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.

ranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough. *Misurella, supra. Weyerhaeuser SS Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, 567. There was no evidence of active "hindrance" by the ship. I. T. O. could either have ordered the men out of the hold when it discovered that conditions were becoming dangerous and the ship's blowers were not turned on, or it could have used its own portable blowers.

The judgment is set aside, on both the complaint and the claim over, and the case is remanded to the District Court for trial.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of June one thousand nine hundred and sixty-five.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
Circuit Judges.

HON. M. JOSEPH BLUMENFELD,
District Judge.

ANTHONY ALBANESE,
Plaintiff-Appellee,

—v.—

N.V. NEDERL. AMERIK STOOMV. MAATS.,
Defendant and
Third-Party Plaintiff-Appellant,

—v.—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Appendix D

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed on both the complaint and the claim over and that the action be and it hereby is remanded to said District Court for a new trial in accordance with the opinion of this Court with costs to defendant-appellant.

A. Daniel Fusaro
Clerk

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FILED
SEP 10 1965
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Supreme Court of the United States

NO. 523

ANTHONY ALBANESE, *Petitioner*

v.

N. V. NEDERL. AMERIK STOOMV. MAATS,
Respondent

v.

INTERNATIONAL TERMINAL OPERATING CO.,
INC., *Co-Petitioner*

AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF PETITIONER

American Trial Lawyers Association
Admiralty Section

By: ARTHUR J. MANDELL

MANDELL & WRIGHT
707 South Coast Bldg.
Houston, Texas

On Petition & Brief

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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Supreme Court of the United States

NO._____

ANTHONY ALBANESE, *Petitioner*

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v.

INTERNATIONAL TERMINAL OPERATING CO., INC., *Co-Petitioner*

AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF PETITIONER

American Trial Lawyers Association
Admiralty Section

STATEMENT OF INTEREST OF THE AMICUS CURIAE

Arthur J. Mandell of Mandell & Wright, Houston, Texas, a member of the bar in this Court, on behalf of the American Trial Lawyers Association, respectfully petitions this Court for leave to file a brief Amicus Curiae on behalf of Petitioner herein, and if granted, for this Honorable Court to consider the arguments and cases in point following this Statement of Interest.

The American Trial Lawyers Association, is a national bar association, consisting of more than 20,000 lawyers,

primarily engaged in the practice of personal injury law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors in admiralty who specialize in maritime tort law, and particularly as it relates to maritime workers covered by the Longshoremen's & Harbor Workers' Act, 33 U.S.C., Sec. 901, et seq., as amended. These maritime workers, engaged as they are in an extremely hazardous industry, have a real and direct interest in the outcome of this appeal.

Said Association is vitally concerned in the final outcome of this case, involving as it does what had been thought to be, until now, two well established principles of law (a) that a shipowner owes a Sieracki seaman, i.e. a longshoreman, an absolute and non-delegable duty to supply him a safe place in which to work, and (b) that The Safety and Health Regulations for Longshoring, promulgated by the Secretary of Labor pursuant to Public Law 85-742, 72 Stat. 835, 33 U.S.C.A. Sec. 941, et seq, in force and effect at the time the injuries to the present petitioner occurred, established an accepted standard of safety binding on the shipowners as well as the stevedores.

The resolution of these two questions are of paramount importance to hundreds of thousands of harbor workers, to the admiralty bar, and to the maritime industry generally. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this Brief Amicus Curiæ.

ARTHUR J. MANDELL,
of MANDELL & WRIGHT
707 South Coast Bldg.
Houston, Texas 77002

Supreme Court of the United States

NO._____

ANTHONY ALBANESE, *Petitioner*

v.

N. V. NEDERL. AMERIK STOOMV. MAATS,
Respondent

v.

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INC., *Co-Petitioner*

BRIEF OF AMICUS CURIAE AMERICAN TRIAL LAWYERS ASSOCIATION

STATEMENT

The American Trial Lawyers Association views the questions presented by the Petitioner in his application for Writ of Certorari as extremely important since the answers will affect thousands of workers engaged in loading and discharging vessels throughout the United States, the admiralty bar, and the maritime industry generally. The holding by the Court of Appeals in this case that the provisions of the "Safety and Health Regulations for Longshoring," as promulgated by the Secretary of Labor do not establish generally accepted standards of safety binding on the shipowner and stevedore alike, represents a direct threat to the safety of those engaged in this type of work and therefore should be dealt with by this Honorable Court.

QUESTIONS PRESENTED

I. Does a shipowner have a non-delegable obligation to provide longshoremen with a safe place in which to work as well as a related duty to discover and correct unsafe work factors?

II. Are the Safety and Health Regulations for Longshoring, (29 C.F.R., Sec. 9.1, et seq.) relevant on the issues of unseaworthiness and negligence in a suit by a longshoreman against a shipowner?

STATEMENT OF THE CASE

For the sake of brevity we adopt Petitioner Albanese's Statement of the Case as it appears on Pages 5-9 of its Application for Writ of Certiorari.

The decision for which review is here respectfully prayed has (a) departed from and tends to erode the established principles of law that a shipowner has an absolute and non-delegable duty to supply longshoremen, "pro hoc vice" seamen, a safe place in which to work, and the related duty to inspect, discover and correct unsafe conditions, and (b) rejected the applicability of the Safety and Health Regulations of Longshoring, promulgated by the Secretary of Labor pursuant to Public Law 85-742, 72 Stat. 835, 33 U.S.C.A. Sec. 941, et seq., as a standard of conduct which if violated constitutes negligence as well as unseaworthiness.

The decision of the Court of Appeals requiring, as a condition precedent to liability, that the evidence must affirmatively show that the shipowner knew of the condition so relaxes the non-delegable duty to supply a safe place in which to work as to make it wholly inoperative.

The non-delegable duty to supply a safe place to work encompasses the duty to inspect and to determine the conditions under which this group of workers are required to discharge their duty. The court, therefore, in charging the jury:

> "And apart from the actual notice you may find a condition which rendered the hold an unsafe area *and existed for sufficient time to charge the defendant with constructive notice* . . . the shipowner had a duty to the plaintiff to remedy those defects of which it knew or in the exercise of reasonable care should have known . . ." (Vol. 1, App. to Def.-Appellant's brief, p. 16a) (Emphasis ours).

correctly stated the applicable law.

A non-delegable duty to supply a safe place to work without the related duty to inspect and determine whether the area is safe for such purpose is restrictive of its non-delegable aspect. Under the charge as given by the Court the jury, even under disputed facts, was the sole arbiter to resolve such dispute.

This court has repeatedly expressed its determination that if the facts justify the reasonable inference that the shipowner's negligence played any part, "even the slightest," in producing Plaintiff's injuries, the issue remains for the jury. *Ferguson v. Moore-McCormack Lines,* 352 U.S. 521, 523; *Rogers v. Missouri Pacific R.R. Co.,* 352 U.S. 500; and followed in many cases, including *Ammar v. American Export Lines, Inc.,* 326 F.2d 955; *U.S.F.&G. v. U.S.A.,* 152 F.2d 46, 49; *Gallick v. B.&O. R. Co.,* 372 U.S. 108.

It is clear that Respondent knew or in the exercise of reasonable care, should have known that hi-los were intro-

duced in the partially covered hatch, and that under such circumstances blowers would be necessary. The blowers were in the exclusive control of the vessel. The failure to use them rendered the hatch an unsafe place to work, i.e., negligence, as well as unseaworthiness. For the foregoing reasons it is respectfully submitted that the opinion and decision of the Court of Appeals be reversed and the jury verdict be reinstated in full.

The Safety and Health Regulations for Longshoring (29 C.F.R., Sec. 9.1, et seq.).

By enactment of Public Law 85-742, 72 Stat. 835, 33 U.S.C.A. 941, et seq., Congress expressed its grave concern of the human toll taken by the hazardous occupation of longshoring.[1] It, therefore directed and empowered the Secretary of Labor to provide for the establishment of an effective safety program in this hazardous occupation.

Prior to the enactment of Title 33, U.S.C.A., Sec. 941, and the promulgations of the regulations thereunder, what constituted negligence or unseaworthiness was to be determined by the jury under the definitions laid down by the Court. The regulations cast no new duty upon the shipowner; neither do they relieve him of any pre-existing duty. With respect to longshoring, the statutory law of the United States, by enactment hereinabove referred to now codifies definite minimum standards. The failure to comply with and meet these standards creates an unsafe place to work. Since the duty to supply a safe place to work is a personal

[1] The House Report accompanying the 1958 Amendment to the Longshoremen's and Harbor Workers' Compensation Act points out that stevedoring is the most hazardous of all industries which report their experience to the Bureau of Labor Statistics, having an injury frequency rate seven times that of manufacturing. (1958 U.S. Code and Cong. News, p. 3843. Sec. 41 of the Act, [33 USCA, Sec. 941 (a)])

duty resting upon the shipowner of which he cannot rid himself by contract or otherwise, he is duty bound to inspect for unsafe conditions, to discover them, and then to remedy them.

Respondent's argument, in the district court and appellate court, that the standards imposed by the Secretary of Labor are entitled to no evidential value (accepted by the trial court and the court of appeals) because the regulations declare that they are not intended to place any additional responsibilities or duties on the shipowner or to relieve them of responsibilities or duties now placed on them by law, has only superficial plausibility, and does not, with all due deference, withstand analysis. These regulations cast upon the shipowner no new duty, nor do they relieve him of any pre-existing duty; now, as before the regulations were promulgated, it is incumbent upon the shipowner to discharge his non-delegable duty to supply a safe place in which to work. Now, as before, if the area where longshoremen are working, becomes an unsafe place to work, be it through the act of the stevedoring contractor or anyone else, if this condition is the cause of an injury, the shipowner is liable. This was the law before the promulgation of the rules, and it is the law now. All the regulations do is define how this well-established duty shall be discharged in particular circumstances by the stevedores who has undertaken to perform the shipowner's non-delegable duty. *Rule 9.93 describes a minimum standard of safety—not a new duty.*[2] There is nothing in the regulation that forbids it being mentioned to the jury. In fact, what possible use would a safety regulation be if its admonition is withdrawn by suppressing knowledge of it from the trier of the facts? How can it be determined whether a condi-

[2] Appendix A. Pet. Application for Writ.

tion complained of meets a standard of safety if the jury is kept in the dark as to what that standard is? To convert the provision which disavows an intent to add to or diminish the owner's duty into a direction to keep the safety provisions secret is to make the entire regulations ineffective and meaningless. *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963). The decision in the Fourth Circuit in Provenza has been cited with approval by many courts.

Marshall v. Isthmian Lines, Inc., 334 F.2d 133 (5th Cir. 1964), involved an alleged violation of certain Coast Guard regulation pertaining to the stowage of hazardous cargo which were designed to minimize the chance of fire. The court held that the regulation was relevant and the jury should have been made aware of it by introducing it in evidence, and through the court's charge. Apparently because the regulation did not specifically refer to a regulation to provide safety for longshoremen, the court concluded that the violation did not constitute negligence per se; nevertheless the court pointed out that, in a flagrant breach of such regulation, a different standard may apply, and the rule set out in *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958) may well be followed. Numerous district courts have reached substantially similar conclusions: See *Skipper v. Amerind Shipping Corp.*, 230 F.Supp. 253 (E.D. La. 1964); *United States v. Grace Line, Inc.*, 221 F.Supp. 339, 9 S.D. N.Y. 1963); *Ray v. Compania Naviera Continental S.A.*, 203 F.Supp. 206 (D. Md. 1962). See also *McHoney v. Marine Navigation Co.*, 233 F.2d 769 (4th Cir. 1956); *Merritt-Chapman & Scott Corp. v. Cornell Steamship Co.*, 265 F.2d 537 (2nd Cir. 1957); *Andros Shipping Co. v. Panama Canal Co.*, 184 F.Supp. 246, 258 (Dist. of Canal Zone, 1960).

The Second Circuit's determination that a shipowner is not under a continuing duty to provide longshoremen with a safe place to work is directly contrary to the holding of the Third Circuit in *Hroncich v. American President Lines, Ltd.*, 334 F.2d 282 (3rd Cir. 1964); the same court's decision in *Ferrante v. Swedish American Line*, 331 F.2d 571 (3rd Cir. 1964); the Fourth Circuit's decision in *Scott v. Isbrandtfen Co.*, 327 F.2d 113 (4th Cir. 1964); the Ninth Circuit's decision in *Aldridge v. States Marine Corp.*, 265 F.2d 554 (9th Cir. 1959); and numerous district court decisions. See, e.g., *Dainer v. SS Longview Victory*, 226 F.Supp. 912 (E.D. Va. 1964).

The appellate court here, notwithstanding this court's decision in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), has nevertheless placed emphasis on the lack-of-control theory on the part of the shipowner in so far as the work of the longshoremen are concerned. This court and many appellate courts have rejected the lack-of-control theory as in Gutierrez, supra, *Peterson v. Alaska Steamship Co.*, 205 F.2d 487, affirmed 347 U.S. 396, and others. Neither can a shipowner contract away its obligation to provide a safe place to work. *Dixon v. United States*, 219 F.2d 10.

CONCLUSION

The wide departure by the appellate court from the standards of safety approved by this Court, the great concern expressed by the courts and Congress, for the safety of these workers in such hazardous industry, and the danger of erosion of these established principles which the decision presented here for review may engender, presents compelling reasons for this court to settle the law, both on the use of the Safety Regulations as a standard of care, and on the doctrine of negligence in maritime cases, so

that the bar, the industry and those working in the industry will have a clear concept of the applicable law.

Respectfully submitted,

AMERICAN TRIAL LAWYERS ASSOCIATION

By A. J. Mandell
Arthur J. Mandell,
Attorney for Amicus Curiae

DATED AT Houston, Texas, this the 9th day of September, 1965.

CERTIFICATE

This is to certify that on the 9th day of September, 1965, copies of the above Application to Appear as Amicus Curiae and Brief in support thereof have been forwarded to:

Robert Klonsky and Philip F. DiCostanzo of DiConstanzo, Klonsky & Sergi, Attorneys for Anthony Albanese, Petitioner, whose consent to file this Application has been obtained, at their office and Post Office address: 66 Court Street, Brooklyn, New York 11201;

Edmund F. Lamb and William E. Fay III, of Purdy, Lamb & Catoggio, Counsel to Schaffner and Furey, Attorneys for N. V. Nederl. Amerik Stoomv. Maats, Respondent, at their office and Post Office address: 80 Broad Street, New York, New York 10004; and to

Sidney A. Schwartz and Joseph Arthur Cohen of Alexander, Ash & Schwartz, Attorneys for International Terminal Operating Co., Inc., Respondent, at their office and Post Office address: 76 Beaver Street, New York, New York 10005.

A. J. Mandell
Arthur J. Mandell

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Supreme Court of the United States

OCTOBER TERM—1965

No. 523

ANTHONY ALBANESE,

Petitioner,

against

N.V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent,

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Co-Petitioner.

OBJECTION TO FILING OF BRIEF OF *AMICUS CURIAE* IN FAVOR OF PETITIONER AND BRIEF IN OPPOSITION

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New York, New York 10004.

WILLIAM E. FAY, III,
On the Brief.

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OBJECTION TO FILING OF BRIEF OF *AMICUS CURIAE* IN FAVOR OF PETITIONER AND BRIEF IN OPPOSITION

Respondent objects to the filing of the brief of American Trial Lawyers Association, Admiralty Section, by Arthur J. Mandell, in favor of petitioner, and has withheld consent to the filing of such brief for the following reasons:

(1) The applicant has no sufficient interest in the outcome of this litigation to be entitled to be heard as *Amicus Curiae*. He does not represent any labor or industrial association but merely an association of attorneys representing personal injury litigants in the maritime field.

(2) The application for leave to file fails to comply with Rule 42.3 of this Court in that it fails to set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties.

(3) The brief of *Amicus Curiae* merely presents a restatement and reargument of the matters contained in the petition for a writ of certiorari filed by the petitioner herein.

Brief in Opposition

I

The brief of *Amicus Curiae* seeks to support petitioner's contention that a longshoreman is entitled to a higher standard of care than that applicable to other persons lawfully on board the owner's vessel, by resort to Jones Act and F.E.L.A. cases.

The notion that there is an absolute nondelegable duty on the part of a shipowner with respect to the employees of independent contractors on board his vessel to perform work which their employer had contracted to perform for the shipowner, was expressly repudiated by this Court in *West* v. *United States,* 361 U. S. 118, 122-123. That the duty of the employer to his employees under the Jones Act and the F.E.L.A. extends beyond and is greater than the general common law duty of care, was noted by this Court in *Kernan* v. *American Dredging Co.,* 355 U. S. 426, 432.

All of the cases cited by *Amicus Curiae* in support of his position, cited at page 5 of his brief, are Jones Act or F.E.L.A. cases with the one exception of *U.S.F. & G.* v. *U.S.A.* 152 F. 2d 46, and no support whatever will be found in that decision for the statement made by *Amicus Curiae,* that the issue of the shipowner's negligence must be left to the jury if "even the slightest" negligence on its part

played any part in producing plaintiff's injury. That case was an admiralty case and obviously, therefore, had nothing whatever to do with what constitutes sufficient proof for a jury question of reasonable care. Moreover, in that case the only negligence that was involved was the shipowner's negligence in respect of the ship's Jacob's ladder which was in the ship's sole possession and control.

What is here sought to be advanced by *Amicus Curiae* is the identical notion which was struck down by this Court in *West*. This is apparent from the following language in the brief of *Amicus Curiae* (p. 7): "It is incumbent upon the shipowner to discharge his non-delegable duty to supply a safe place in which to work. * * * if the area where longshoremen are working, becomes an unsafe place to work, be it through the act of the stevedoring contractor or anyone else, if this condition is the cause of an injury, the shipowner is liable." This is an apparent attempt to infuse into the law of negligence an absolute duty on the part of the shipowner to provide a safe place to work apart from fault, thus imposing upon the shipowner a burden even greater than the warranty of seaworthiness, which depends upon reasonable fitness for use, and making the shipowner the absolute guarantor or insurer of the longshoremen's safety. Apparently the association of maritime personal injury litigant attorneys is unwilling to accept the unanimous decision rendered by this Court in 1959 in *West*.

II

Amicus Curiae seek to treat the Safety and Health Regulations for Longshoring, adopted by the Secretary of Labor pursuant to statutory authority under the Longshoremen's and Harbor Workers' Compensation Act as if the Regulations now establish a definition of "negligence or unseaworthiness" binding upon the shipowner. Adopted as they were, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 941,

et seq., they obviously could not impose statutory obligations upon the shipowner unless he were the employer of labor covered under the Act, and naturally the Regulations, by their terms, so provide.

While purporting to give lip service to these necessary limitations of the Regulations, as respects a shipowner, *Amicus Curiae* nevertheless make the unsupported statement that: "The failure to comply with and meet these standards creates an unsafe place to work" (p. 6) and renders the shipowner liable if he fails "to discover them, and then to remedy them" (p. 7). It was precisely this erroneous contention, advanced by petitioner and co-petitioner which was accepted by the trial court, but rejected by the Court of Appeals. Respondent never contended that the Regulations were not entitled to any evidential value under appropriate circumstances when properly applied (as suggested by *Amicus Curiae* at page 7). Respondent did contend, unsuccessfully in the district court, but successfully in the Court of Appeals, that the use petitioner and co-petitioner sought to make of the Regutions was erroneous.

Of the cases cited by *Amicus Curiae* (at p. 8) only the following involve the Safety and Health Regulations. *Provenza* v. *American Export Lines, Inc.*, 324 F. 2d 660; *Skipper* v. *Amerind Shipping Corp.*, 230 F. Supp. 253; *United States* v. *Grace Line, Inc.*, 221 F. Supp. 39; *Ray* v. *Compania Naviera Continental S.A.*, 203 F. Supp. 206.

As pointed out in respondent's brief in opposition to the petition, there is no conflict between the decision of the court below and the decision of the Fourth Circuit in *Provenza*. Respondent does not question that *Provenza* outlined a proper and appropriate use of the Regulations as evidence which the trier of the facts may consider in determining whether or not the stevedore in his operations has or has not rendered the ship unseaworthy; for which, of course, the owner could be liable under the *Sieracki* doctrine.

There is nothing in *Skipper* v. *Amerind Shipping Corp., supra,* which justifies a different treatment for the use of the Regulations as against the shipowner. See *Deffes* v. *Federal Barge Lines, Inc.,* 229 F. Supp. 719, 721.

United States v. *Grace Line, Inc.* involved a proceeding by the United States for a permanent injunction to restrain Grace Line, as an employer of longshoremen, against violations of the Safety and Health Regulations pursuant to Section 41(e) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 941(e). The case obviously has not the slightest relevancy to the question presented at bar.

Ray v. *Compania Naviera Continental S.A.* involved a use of the Regulations as against the stevedore on a claim for indemnity (203 F. Supp. at p. 210). Again, this case is of no relevancy on the question here presented.

None of the cases cited by *Amicus Curiae* in the first paragraph on page 9 of his brief have even the slightest application to the problem here presented, except *Gainar* v. *S.S. Longview Victory,* 226 F. Supp. 912. They have to deal with the question of the correction of an unseaworthy condition created in the vessel by the stevedore's methods of operation, as in *Scott;* with the question of the liability of a shipowner in negligence where he knowingly allows a stevedore to employ an obviously unsafe method of removing the ship's cargo from the hold of the vessel, as in *Hroncich* and *Ferrante,* or of breaking open the ship's dunnage, as in *Aldridge.* The question in the present case as regards plaintiff's petition is whether a shipowner may be held liable in negligence on the basis that an unsafe condition which was created in the place of work by an instrumentality employed by the stevedore, had existed for a sufficient length of time to charge the shipowner with notice of it, although he did not in fact have knowledge thereof.

Gutierrez has been sufficiently discussed in respondent's brief in opposition to plaintiff's petition to render further discussion unduly repetitious. *Peterson,* of course, has no application on the question of negligence, relating as it does to the question of unseaworthiness by incorporation into a ship's gear of a defective instrumentality.

Dixon, again, is a Jones Act case. It could be expected that counsel learned in the field of maritime personal injury law would refrain from confusing seamen's Jones Act cases with longshoremen's diversity cases, but apparently this expectation is naive. That Jones Act principles have no application to longshoremen's diversity cases has been too often stated to bear further repetition.

CONCLUSION

For the foregoing reasons, the motion of American Trial Lawyers Association, Admiralty Section, by Arthur J. Mandell, for leave to file a brief *Amicus Curiae* on behalf of petitioner herein, should be denied.

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 523

ANTHONY ALBANESE,

Petitioner,

against

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent,

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Co-Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OCTOBER TERM, 1965

No. 523

ANTHONY ALBANESE,

Petitioner,

against

N. V. NEDERL. AMERIK STOOMV. MAATS.,

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INTERNATIONAL TERMINAL OPERATING CO., INC.,

Co-Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The opinion of the United States Court of Appeals for the Second Circuit is reported at 314 F. 2d 323.

Jurisdiction

Although jurisdiction may exist under Title 28 U.S.C. Sections 1254(1) and 2101(c), the petition fails to establish any genuine grounds for the granting of a writ under Rule 19(1,b) or Rule 20 of the revised Rules of this Court.

Questions Presented

Petitioner seeks a review by this Court of the judgment of the Court of Appeals for the Second Circuit, which set aside a judgment in favor of petitioner, a longshoreman, against respondent, a vessel owner, upon whose vessel petitioner claims to have sustained injury, and ordered a new trial because of error in the charge and in the admission of evidence.

The petition presents no novel question nor any special compelling or important reason for a review of the case by this Court. The respondent on its appeal to the Circuit Court from the judgment in favor of petitioner had urged error of the District Court in failing to direct a verdict in favor of the respondent, both on the issues of unseaworthiness and negligence; error in the submission of the case to the jury in several respects on both issues; errors in the admission or rejection of testimony, and gross excessiveness of the verdict.

Having found error in the submission of the case to the jury on the question of negligence and in the improper admission of certain evidence, the Court of Appeals has directed a new trial of the case. Since a new trial has been granted petitioner, he cannot, of course, have been deprived of any right to a jury trial under the Seventh Amendment. In granting a new trial, the Court has in fact sustained petitioner's right to have a jury pass on the claims made by him, and has overruled respondent's contention that it was entitled to directed verdicts. Other questions raised by respondent on appeal, in view of the fact that a new trial has been granted, have not specifically been passed upon by the court below.

Thus, all that the petitioner seeks to have reviewed by this Court are rulings by the Court of Appeals as to the propriety of the charge on negligence and as to the admis-

sion in evidence, as against respondent, of one of the Safety and Health Regulations for Longshoring promulgated by the Secretary of Labor, although respondent was not the employer of the longshoremen. Neither of these questions could be completely dispositive of this case, nor could be of far reaching consequence since the case has been remanded for a new trial.

As will hereinafter be pointed out, the ruling of the Court of Appeals with respect to the error in the charge on negligence not only is not contrary to any decision of this Court but is in clear accord with the decisions of this Court in *United New York and N.J.S.H. Pilots Assn.* v. *Halecki,* 358 U. S. 613; *Kermarec* v. *Comp. Gen. Transatlantique,* 358 U. S. 625 and *West* v. *United States,* 361 U. S. 118, and with a long line of decisions in the Court of Appeals for the Second Circuit, as to which this Court has consistently denied certiorari.

As to the ruling on the admissibility of the Safety and Health Regulation for Longshoring, the decision of the Court of Appeals, as will hereinafter be pointed out, is not only not in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Provenza* v. *American Export Lines Inc.,* 324 F. 2d 660, cert. den. 376 U. S. 952, but is completely consistent with that decision.

Where a case is submitted to a jury for a general verdict on alternate grounds, one of which is not sustainable as a matter of law or where error is found in the admission of evidence, the verdict must be vacated and a new trial granted. *Sunkist Growers* v. *Winckler & Smith Co.,* 370 U. S. 19, 29-30; *United New York and N.J.S.H. Pilots Assn.* v. *Halecki,* 358 U. S. 613, 619; *Fatovic* v. *Nederlandsch-Ameridaansche Stoomvaart,* 275 F. 2d 188, 190; *Mosley* v. *Cia. Mar Adra, S. A.,* 314 F. 2d 223, 226-227, cert. den. 375 U. S. 829, 835.

Statement of the Case

The petitioner, together with eight other longshoremen comprising the No. 2 gang, had been working in the lower No. 2 hold of the vessel since approximately 8:00 A.M. During all this time a gasoline-powered hilo, owned and placed aboard by his employer, the co-petitioner, had been in continuous operation in the hold. At about 10:45 A.M. a second gang of longshoremen, comprised of nine men, identified as the No. 7 gang, began working in the after half of the upper 'tween deck, also employing a hilo owned and placed aboard by their employer, the co-petitioner. About 10 or 15 minutes after this second gang began working, the longshoremen complained of fumes from the hilos, and then, for the first time, requests were made of a ship's officer to turn on the ship's forced ventilating system, which although designed primarily for the ventilation and dehumidifying of cargo while the vessel is at sea with the hatches closed, could and had often been used as a forced ventilating system during the course of the loading of cargo. Up until that time no complaint had been made by any of the longshoremen of conditions in the hold, and no request had been made by any of the hatch bosses or other supervisory employees of the stevedore for forced ventilation.

On the issue of negligence, the trial court charged the jury (App. to Deft.-Appellant's Brief, pp. 14a-15a):

> "Under the circumstances, the shipowner owed to the plaintiff, so reads the law, the duty to use reasonable care to see that the hold area was a reasonably safe place in which to work. So the shipowner was under a duty, if there was any danger involved in the work which subjected plaintiff to unreasonable or peculiar risk of injury which the shipowner knew of *or in the exercise of reasonable care should have known of or discovered,* and to have advised the plaintiff or to

take adequate steps to protect him against such dangers, because it is the law that the shipowner's duty to the plaintiff was entirely independent of any which his employer, the stevedore company, owed to him, entirely independent, and the fact that his employer owed him a substantially similar duty did not relieve the shipowner of its obligations to the plaintiff. It is what the law terms a non-delegable duty, one that could not be transferred to another." (Emphasis supplied.)

In connection with the proof that a request had been made to a ship's officer to turn on the ship's ventilating system and that he had promised to do so, the court charged the jury as follows (App. to Deft.-Appellant's Brief, p. 15a):

"If you believe this testimony, such requests would be sufficient to put the shipowner on actual notice that an unsafe condition existed. Even if you believe that the defendant did not have actual knowledge of the unsafe condition in the hold, you may find, considering all the evidence you have heard, that the condition existed for a sufficient length of time to charge the shipowner with notice of it."

The Court of Appeals in its original opinion held that:

"This was erroneous, for a shipowner who hires a qualified stevedore to load the vessel is not bound to any duty of active supervision of the stevedore's work." (Petition, App. C, p. 30.)

In its revised opinion, this sentence was amended to read as follows:

"This was erroneous, for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that he actively super-

vise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist." (Petition, App. B, p. 23)

In its revised opinion the Court of Appeals went on to say:

"As pointed out in *Berti* v. *Compagnie de Navigation, etc.*, 213 F. 2d 397, 2 Cir. 1954, to lay down a contrary rule, which on the facts here would mean that mere knowledge of the use of hilos would create a duty on the part of the owner to turn on the ventilators even though he had no knowledge that the hold had become an unsafe place to work, would be to confuse the concept of unseaworthiness with that of negligence."

During the presentation of third-party defendant's case, the stevedore, the co-petitioner, over strenuous objection by respondent, was allowed to read into evidence Section 9.93(a) of the Safety and Health Regulations for Longshoring, promulgated by the Secretary of Labor, effective March 21, 1960 (29 C.F.R. Sec. 9.1, *et seq.*; renumbered as of January 1, 1964, Sec. 1504.1, *et seq*), pursuant to Public Law 85-742 (72 Stat. 835), 33 USCA Sec. 941 (a)-(g), (App. to Deft.-Appellant's Brief, pp. 248a-250a, 254a-258a). The Court specifically charged that these regulations were equally as binding upon the shipowner as upon the stevedore-employer (App. to Deft.-Appellant's Brief, pp. 258a-259a, 260a), despite the fact that the regulations were promulgated pursuant to the Longshoremen's and Harbor Workers' Compensation Act, and by their terms (Sec. 9.1(a) and (b), now 1504.1(a) and (b), Sec. 9.2, now 1504.2, and Sec. 9.3(c) and (d), now 1504.3(c) and (d)), apply only to the stevedore-employer and specifically exclude any intent "to place additional responsibility or duty on owners, operators, agents or masters of vessels unless such persons are acting as employers" (Sec. 9.2, now 1504.2).

As to this ruling of the district court, the Court of Appeals held as follows (Petition, App. B, p. 25):

> "There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the excluding clause of Sec. 9.2(b) and the lack of any testimony as to what the concentration of carbon monoxide in the hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached."

While there was evidence in the case that someone had been observed in the lower hold at 10:10 A.M. with an instrument used for making tests of carbon monoxide content, there was no proof as to whether he actually made a test or, if so, what it disclosed (App. to Deft.-Appellant's Brief, pp. 172a-173a).

Thus the question presented in this case was not whether the Safety and Health Regulations could be used as evidence establishing generally accepted standards of safety, as petitioner repeatedly states, but whether the regulations could be used as establishing an obligation on the part of the shipowner, in the context of this case, to use its forced ventilating system, which was the import which the district court gave to the regulations.

It is not true, as stated by petitioner, that: "Respondent itself first referred to these regulations and offered portions thereof in evidence". (Petition, p. 7). Questions ad-

dressed by respondent to third-party defendant's pier manager relating to what the regulations required of him, were excluded upon objection thereto (App. to Pl.-Appellee's Brief, p. 32a, App. to Third-Party Deft.-Appellee's Brief, pp. 26a-27a).

Neither is it true, as stated by petitioner at page 8 of his petition, that there was uncontradicated proof of substantial air contamination in the lower hold before and during petitioner's collapse. There were nine men working in the lower hold at the time plaintiff collapsed, and an additional nine men working in the upper 'tween deck. It was stipulated at the trial that the plaintiff was the only one who made any complaint of being overcome by carbon monoxide, or who received any emergency treatment (App. to Deft.-Appellant's Brief, p. 130a).

As above pointed out, although someone had been in the hold with a carbon monoxide measuring instrument, there was no testimony as to what, if any, findings he made. That the hold may have appeared hazy after the accident is of no consequence, since carbon monoxide is both colorless and odorless (App. to Deft.-Appellant's Brief, p. 103a). Plaintiff's medical expert admitted that for a person to be subjected to carbon monoxide poisoning depends upon the concentration of carbon monoxide in the air and the length of exposure (App. to Deft.-Appellant's Brief, p. 103a), and that there have been tolerable limits established for working over extended periods of time, even as much as eight hours a day in confined areas (App. to Deft.-Appellant's Brief, p. 102a). As for his alleged testimony that from the effects on petitioner, one "must assume" adequate concentration to cause intoxication, his testimony on cross-examination was as follows:

> "Q. So that when you expressed an opinion with respect to exposure to carbon monoxide fumes in the hold of a vessel as it being a competent producing cause of carbon monoxide poisoning, you were express-

ing that opinion without any knowledge at the time you expressed that opinion of the degree of concentration of carbon monoxide in the air which would be necessary to cause a carbon monoxide poisoning? A. Oh, I'm sorry. I misinterpreted your question. I assumed, of course, that there was adequate carbon monoxide concentration in the hold to which this patient was exposed to cause his intoxication. This adequate concentration varies considerably based upon time of exposure and actual air concentration, and these I do not know." (App. to Pltf.-Appellee's Brief, p. 5a)

He also conceded with respect to plaintiff that he was unable to state whether the brain injury was a result of anoxia or of plaintiff's fall into the hold (App. to Pltf.-Appellee's Brief, p. 5a).

ARGUMENT

A—As to the error in the charge.

Not a single case in this Court is cited by petitioner for the rather astounding statement that the opinion of the Court of Appeals for the Second Circuit in this case was "written with apparent disregard of the paramount authority of well defined principles enunciated by this Court", or for the equally astounding statement that the opinion of the Court of Appeals for the Second Circuit "seeks to establish a novel and retrogressive principle of law exonerating a shipowner from its historic and non-delegable obligation of due diligence and care when it * * * should have known that a longshoreman was working in an unsafe place aboard its merchant vessel in navigable waters". Neither is there any case law cited for no less astounding statement that: "By this decision a remedy in

negligence for maritime workers doing the work of seamen is diluted to less than any other common-law personal injury litigant would expect" (Petition, p. 10).

Petitioner seems to claim that contrary to the law as enunciated by this Court, a business invitee, be he a longshoreman, is entitled in negligence to a higher standard of care on the part of a shipowner than would be any other person lawfully on board the shipowner's vessel on purposes not inimical to the interests of the shipowner. This notion was struck down by this Court in *Kermarec* v. *Transatlantique,* 358 U. S. 625, wherein this Court stated: "The distinctions which the common law draws between licensee and invitee" (358 U. S. 630) will not be incorporated into admiralty law, since: "The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect entirely alien to the law of the sea" (Id. 631-632). In the cited case, this Court enunciated the following principle (358 U. S. 632):

> "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case."

On the same date on which *Kermarec* was handed down, this Court also handed down its decision in *United New York and N.J.S.H. Pilots Assn.* v. *Halecki,* 358 U. S. 613, in which this Court, reversing a general verdict rendered upon the grounds of unseaworthiness and negligence (holding that the warranty of seaworthiness was not applicable to the plaintiff), found a jury question for determination where the shipowner had required plaintiff's employer to clean its ship's generators with carbon tetrachloride, whether the shipowner had exercised reasonable care in

permitting or authorizing the method or manner of the use of the carbon tetrachloride in the confined space of the ship's engine room while the ship was in drydock.

In *West* v. *United States,* 361 U. S. 118, this Court struck down a contention that alternative to liability of the shipowner for unseaworthiness, there could be liability for a breach of a non-delegable duty to furnish a safe place to work (Id., p. 122). In holding that apart from the doctrine of seaworthiness, there is in the maritime law "no basis of liability apart from fault" (Id., p. 123), the Court unanimously concluded that (p. 123):

> "The respondent (shipowner), having hired Atlantic to perform the overhaul and reconditioning of the vessel—including the testing—was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract",

citing the decision of the Court of Appeals for the Second Circuit in *Filipek* v. *Moore-McCormack Lines, Inc.,* 258 F. 2d 734, which petitioner refers to as "inapposite and long overruled". This Court said, citing that case (361 U. S. 123):

> "Although some of respondent's employees were on board the ship here, this would not attach liability since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers,"

It may be true that, as said by the Court of Appeals in this case, a finding of negligence could be justified if the hatch bosses sometime between 10:55 and 11:05 A.M. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so, if also his failure to do so was a proximate cause of plaintiff's injury; but in this case that question was not even submitted to the jury. The fact issue as to whether such a request had been made of a ship's officer and such promise was made by him, was sub-

mitted to the jury in this case only on the question of whether the shipowner had actual or constructive notice that an unsafe condition existed. Thus the District Court specifically charged the jury as follows (App. to Deft.-Appellant's Brief, p. 15a):

> "If you believe this testimony, such requests would be sufficient to put the shipowner on actual notice that an unsafe condition existed. Even if you believe that the defendant did not have actual knowledge of the unsafe condition in the hold, you may find, considering all the evidence you have heard, that the condition existed for a sufficient length of time to charge the shipowner with notice of it."

The question here presented is whether it was error for the Court to charge that without such a request the shipowner could be held in negligence for constructive knowledge that an unsafe condition had been created in the hold by reason of the exhaust of carbon monoxide fumes from hilos brought into the hold by the stevedores, owned by them, under their sole supervision and control and being used solely by them, where the stevedore was an independent contractor employed under a written contract as an expert, having sole supervision and control over the loading of the vessel (Deft's Ex. D, App. to Deft.-Appellant's Brief, pp. 273a-282a, received in evidence, p. 227a). This, we submit, has been already answered by this Court in *West*, and by the Circuit Court of Appeals in *Filipek* and a long line of similar decisions.

In *West*, this Court distinguishes both *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423, and *United New York and N.J.S.H. Pilots Assn.* v. *Halecki*, *supra*. As to *Crumady*, this Court pointed out that it was the shipowner's own employees who had set the safety cut-off device on the winch at twice the tonnage limit of the rigging,

and thus made it unsafe and dangerous (361 U. S. at pp. 123-124).

As to *Halecki,* this Court stated that the basis of its decision there was that "the shipowner directed the use of carbon tetrachloride in the confined spaces of the engine room" (361 U. S. App. 124).

The decision of the Court of Appeals in the present case, following its prior decisions in *Berti* v. *Compagnie de Navigation,* 213 F. 2d 397 and *Filipek* v. *Moore-McCormack Lines, Inc.,* 258 F. 2d 734, cert. den. 359 U. S. 927, was but applying the rule which it has consistently applied and which this Court, by the citation of *Filipek* in *West,* has approved. See *Gallagher* v. *United States Lines,* 206 F. 2d 177, cert. den. 346 U. S. 897, reh. den. 346 U. S. 940; *Lyon* v. *United States,* 265 F. 2d 219; *Oblatore* v. *United States,* 289 F. 2d 400, 402; *Puddu* v. *Royal Netherlands S. S. Co.,* 303 F. 2d 752, 753, cert. den. 371 U. S. 840, reh. den. 371 U. S. 917; *Forkin* v. *Furness, Withey & Co.,* 323 F. 2d 638, 640.

It is obviously no distinction, as to the applicable rule of law, that in some instances the plaintiffs, as in *Filipek,* were not persons entitled to the warranty of seaworthiness; for in other cases, as in *Gallagher, Berti, Oblatore* and *Puddu,* they were longshoremen, and by this Court's decision in *Kermarec,* it makes no difference respecting a shipowner's liability in negligence whether the plaintiff was a longshoreman entitled to the warranty of seaworthiness or not. What petitioner is here seeking to do is to put the longshoreman in a class by himself, not only with respect to the warranty of seaworthiness but also with respect to negligence. It is eminently clear, we submit, that as said by the Court of Appeals in its decision herein, to lay down a contrary rule than that enunciated by the Court of Appeals would be to confuse the concept of unseaworthiness with that of negligence. That is precisely the error which the Trial Court made in this case, for

at another point in its charge it said: "the shipowner's obligation to provide a seaworthy vessel includes the obligation to provide plaintiff with a reasonably safe place to work" (App. to Deft.-Appellant's Brief, p. 21a).

By the decision of this Court in *Mitchell* v. *Trawler Racer Inc.*, 362 U. S. 539, it has definitely been established that there "is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history" (Id., p. 550).

Even in cases involving seamen who have the benefit of the seaworthiness warranty and of the Jones Act, this Court has been careful to distinguish between the concepts of unseaworthiness and applicable negligence: See *Michalic* v. *Cleveland Tankers*, 364 U. S. 325, 327-328.

In none of the cases cited by petitioner at page 11 was the principle of *Berti*, as to negligence, ever questioned. Only as to the holding with respect of unseaworthiness was the validity of that case questioned by the District Court in *Holley* v. *The Manfred Stansfield*, 186 F. Supp. 212 at page 215. The decision of the District Court in *Holley*, which was not appealed, has itself been subjected to criticism by other courts. See *Holmes* v. *Mississippi Shipping Co.* (CA 5), 301 F. 2d 474, 478-479; *Cavelleri* v. *Isthmian Lines Inc.* (SDNY), 190 F. Supp. 801.

In *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206, referred to by petitioner (p. 11), the plaintiff, who was working upon a dock, was caused to be injured by slipping on loose beans which had been spilled from broken bags being unloaded from defendant's vessel. It appeared from the evidence that the bean bags which were being discharged "were leaking while still in the ship", that "beans spilled out of the bags throughout unloading" and that "coopers were sent aboard to repair the torn bagging" (Id., p. 211). This was the condition of the cargo at the time it was offered by the ship to the stevedore for dis-

charge. It was in relation to the shipowner's duty with respect to the creation of foreseeable risk of harm by reason of unloading bags in that condition, and only in that respect, that the Court referred to the shipowner as having an absolute and non-delegable duty of care toward the plaintiff not to create such risk, likening the case to *Byrne* v. *Boadle,* 2 H & C 722 (Exch.), where a pedestrian was hit by a barrel which the property owner allowed to drop from his loft (Id., p. 211). Thus *Gutierrez* has no similarity to the present case whatever.

That the plaintiff, if a shoreside common law personal injury litigant, under the circumstances of this case could have no recovery whatever absent a specific direction or assurance of safety given to him in respect of the instrumentality of his injury, is settled beyond peradventure of argument. Since this is a diversity case, plaintiff's rights, if he were a non-maritime employee injured ashore, would be regulated by New York law. Under New York law, in the context of this case, he clearly could have no recovery whatever. *Uppington* v. *City of New York,* 165 N. Y. 222, 233-235; *Hess* v. *Bernheimer & Schwartz Brewing Co.,* 219 N. Y. 415, 418-419; *Iacono* v. *Frank & Frank Contracting Co.,* 259 N. Y. 377, 381; *Gallagher* v. *United States Lines Co.* (CCA 2), 206 F. 2d 177, 179; *Wallach* v. *United States,* 291 F. 2d 69, 70, cert. den. 368 U. S. 935; *Galbraith* v. *United States,* 296 F. 2d 631; *Broderick* v. *Cauldwell-Wingate Co.,* 301 N. Y. 182, 187; *Zucchelli* v. *City Construction Co.,* 4 N. Y. 2d 52; *Gasper* v. *Ford Motor Co.,* 13 N. Y. 2d 104; *Wright* v. *Belt Associates Inc.,* 14 N. Y. 2d 129, 134; *Persichilli* v. *Triborough Bridge & Tunnel Authority,* 16 N. Y. 2d 136, 145-146.

B—As to the Safety and Health Regulations for Longshoring.

The District Court in the present case allowed to be read to the jury Section 9.93(a) of the Safety and Health Regulations for Longshoring (29 C.F.R. Sec. 9.1, *et seq.,*

renumbered as of January 1, 1964, 1504.1, *et seq.*), promulgated by the Secretary of Labor in 1960 pursuant to Public Law 85-742 (72 Stat. 835), 33 U.S.C.A. Sec. 941(a) through (g), the Longshoremen's and Harbor Workers' Compensation Act, reading as follows:

> "(a) When internal combustion engines exhaust into the hold or intermediate deck, and neither natural ventilation nor the ship's ventilating system is adequate to keep the carbon monoxide content of the atmosphere in the hold or intermediate deck below 100 parts per million, the employer shall use blowers sufficient in size and number and so arranged as to do so. The intakes of blowers shall be adequately guarded by screens",

charging over the objection of respondent (App. to Deft.-Appellant's Brief, pp. 248a-250a, 254a-257a) that this Regulation was equally as binding upon the shipowner as upon the stevedore (App. to Deft.-Appellant's Brief, pp. 258a-259a, 260). The regulation was not submitted to the jury as a pertinent standard of safety, as so often stated by petitioner, but rather as a regulation binding upon the shipowner as well as upon the stevedore.

The effect of reading the regulation to the jury, coupled with such an instruction, was to import to the jury that there was a statutory duty imposed upon the shipowner to employ the ship's ventilating system to keep the carbon monoxide content below 100 parts per million, and that only if the ship's ventilating system should prove inadequate to do so was there any obligation upon the employer to use blowers. In view of the stipulation in the record that the ship's ventilating system was adequate, in view of the charge that the ship could be held liable in negligence for constructive knowledge that an unsafe condition had been created in the hold by the exhaust of the hilos, and in view of the fact that there was no evidence

whatever as to what the concentration of carbon monoxide in the hold in fact was, it becomes apparent that if in fact this Regulation does not impose a statutory obligation upon the shipowner to use the ship's blowers to keep the concentration below 100 parts per million, the error in allowing the regulation to be read to the jury with such an instruction was not only highly prejudicial to the respondent, but possibly the controlling factor in bringing about the verdict which was in fact rendered; for the jury could have concluded that it was the shipowner's obligation to ascertain whether the carbon monoxide content had exceeded the allowable limit.

By a clarifying amendment to Regulation 9.93(a) promulgated by the Secretary of Labor on November 9, 1961 (26 F. R. 10795-97, November 18, 1961), Section 9.93(a) was amended to read as follows (now Sec. 1504.93(a)):

> "(a) Ventilation requirements with respect to carbon monoxide:
>
> (1) When internal combustion engines exhaust into the hold or intermediate deck, the employer shall see that tests of the carbon monoxide content of the atmosphere are made as frequently as conditions require to ensure that dangerous concentrations do not develop. Employees shall be removed from the compartment involved when the carbon monoxide concentration exceeds 100 parts per million (.01%). When neither natural ventilation nor the vessel's ventilating system is adequate to keep the carbon monoxide concentration below this allowable limit, the employer shall use blowers sufficient in size and number and so arranged as to accomplish this before work is resumed."

The clarifying amendment makes it eminently clear that the intent of the Regulation was to put squarely upon the shoulders of the stevedore, the obligation to see to

it that the concentration of carbon monoxide does not exceed the allowable limit and to remove his employees from the work area if it should, until provision has been made to keep the concentration within the allowable limit, permissively authorizing the use of ship blowers for that purpose but not exonerating the employer from the obligation to supply his own blowers if the ship's system should be inadequate. This clarifying amendment gives clear indication that it was never the intent of the Secretary of Labor to attempt to exceed his statutory authority by imposing obligations upon the shipowner.

The case of *Provenza* v. *American Export Lines*, 324 F. 2d 660, cert. den. 376 U. S. 952, not only does not support the use which the District Court allowed to be made of the regulation in the present case, but is entirely in accord with the decision of the Court of Appeals in the present case. In *Provenza*, the Court, recognizing that the Regulations were enacted pursuant to the authority of the 1958 Amendment to the Longshoremen's and Harbor Workers' Compensation Act (Id., p. 663), rejected plaintiff's contention that a violation of the Regulations, "no matter by whom violated, *ipso facto* makes the shipowner liable" (pp. 663-664), saying (p. 665), "here the Regulations by their express terms apply only to the stevedore", and further (p. 665): "The regulation casts upon the shipowner no new duty nor does it relieve him of any pre-existing duty." This obviously must be so since; (1) the authority of the Secretary of Labor to enact the Regulations derives solely from the Longshoremen's and Harbor Workers' Compensation Act which is applicable only to employers in respect of employees covered by the Act; (2) the Regulations by their very terms and by the definitions contained therein reject any implication of imposing obligations upon shipowners who are not employers of labor covered by the Act (Secs. 9.1, 9.2, 9.3(c) and (d), now renumbered Sec. 1504.1, 1504.2, 1504.3(c) and (d)).

While the Safety and Health Regulations may be employed as against a shipowner in determining whether or not a ship is or is not unseaworthy, they obviously cannot be employed to establish a duty upon the shipowner to take action in accord with the Regulations. The limitation upon the proper use of these Regulations as against a shipowner is well expressed in the opinion of the District Court in *Deffes* v. *Federal Barge Lines, Inc.*, 229 F. Supp. 719, 721:

> "Violation of a safety regulation applicable to a stevedore does not render a vessel unseaworthy unless the violation creates a dangerous condition aboard the vessel, which would constitute a defect in the vessel's hull, gear, stowage and appurtenant appliances and equipment."

A proper use of the Regulations in the instant case would have been to charge the jury that under the safety standard established by the Regulations, there was no proof in this case that an unsafe condition had in fact been created in the hold.

This Court's decision in *Kernan* v. *American Dredging Co.*, 355 U. S. 426, has no application whatever to the case at bar. That case involved a claim for the wrongful death of a seaman under the Jones Act, which in turn is based upon the Federal Employers Liability Act (Id., pp. 428-430). The regulation which was there involved was a Coast Guard Regulation specifically made binding upon the owner of the vessel. The basis of the Court's decision was that the Jones Act, incorporating as it does the F.E.L.A., establishes in seamen's cases a type of liability for the breach of a statutory duty without regard to negligence concepts (Id., pp. 430-433). In so doing this Court pointed out that under the Jones Act, as under the F.E.L.A., the employer's "fault may consist of a breach of the duty of care, analogous but by no means identical to the general common law duty, or of a breach of some statutory duty"

(Id., p. 432). The present case, of course, does not involve the Jones Act since the plaintiff was neither a seaman nor the defendant his employer.

Kernan is, of course, likewise distinguishable from the present case upon the ground, as pointed out in *Provenza*, "because the regulation in that case applied to the shipowner, where as here the regulations by their express terms apply only to the stevedore" (324 F. 2d at p. 665).

In *Provenza*, in stating that if a violation of the regulations by the stevedore created a dangerous condition, then the shipowner was in turn also liable, the Court was referring to liability for unseaworthiness. The balance of the quotation, which petitioner fails to give at page 14, clearly indicates this, for it concludes: "for that is the nature of the owner's duty of seaworthiness" (Id., p. 665). We are here dealing not with the doctrine of seaworthiness but with the concept of negligence. In that concept, clearly *Kernan* has no application and there is no divergence between the decision of the Court of Appeals in this case and the decision of the Court of Appeals for the Fourth Circuit in *Provenza*.

Conclusion

For the foregoing reasons petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 557

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

and

ANTHONY ALBANESE,
Co-Petitioner,

against

N. V. NEDERL. AMERIK STOOMV. MAATS.,
Respondent.

BRIEF IN OPPOSITION TO PETITION OF INTERNATIONAL TERMINAL OPERATNG CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1965

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

and

ANTHONY ALBANESE,

Co-Petitioner,

against

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

BRIEF IN OPPOSITION TO PETITION OF INTERNATIONAL TERMINAL OPERATNG CO., INC. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The opinion of the Court of Appeals for the Second Circuit, filed June 15, 1965, is reported at 346 F. 2d 481.

Jurisdiction

While jurisdiction may exist under 28 U.S.C. Sec. 1254(1), the petition fails to set forth sufficient reason for the granting of the petition under revised Rule 19 of this Court.

The only question really presented by this petition, viz., whether there was error in the charge of the District Court on the question of maritime indemnity, is solely dependent upon the action of this Court in respect of the petition for a writ of certiorari of Anthony Albanese, the plaintiff

herein, No. 523 on this Court's docket; for if the principal action of Anthony Albanese against respondent must be retried, the issue of respondent's right to indemnification from the co-petitioner, third-party defendant, must be determined within the context of the proof presented upon the retrial. *Fatovic* v. *Nederlandsche-Ameridaansche Stoomvart, Maatschlappij* (CA 2), 275 F. 2d 188, 191; *Bordas & Company* v. *Pizarro Serrano* (CA 1), 314 F. 2d 291.

Questions Presented

On the appeal to the Court of Appeals for the Second Circuit taken by respondent-shipowner in this case, respondent urged, in addition to error in the submission of the case to the jury on the question of indemnity, that respondent was entitled to a directed verdict against petitioner-stevedore as a matter of law. The Court of Appeals, finding error in the submission of the case to the jury under the charge on indemnification, has directed a new trial of this issue. Thus petitioner can neither complain that it has been deprived of due process of law under the Fifth Amendment to the Constitution nor of a jury trial under the Seventh Amendment.

All that is really involved in this petition for a writ of certiorari is the question whether or not the Court below erred in holding that the case was not properly submitted to the jury on the issue of indemnity. This, as above pointed out, is a moot question unless a writ should be granted on the plaintiff's petition.

Respondent challenges the statements made by petitioner under the heading "Questions Presented"; that the reversal was predicated on "an alleged erroneous charge which the record discloses was not given" (Petition, p. 2), and th t the ship's officer gave any "added assurance that he would promptly and entirely eliminate the dangerous condition" (Petition, p. 3).

What this Court meant as "conduct on its part sufficient to preclude recovery" in *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, 567, as will hereinafter be pointed out, is sufficiently made clear for the resolution of that question by the lower courts in the varying fact situations presented in particular cases. To attempt to spell out a yardstick applicable to every case under no matter what varying circumstances, would be an exercise in frustration and more confusing than helpful.

Constitutional Provisions Claimed to Be Involved

The attempt by petitioner to involve in this case the due process clause of the Fifth Amendment to the Constitution impugns the judicial integrity of the Court of Appeals for the Second Circuit.

That the right to a jury trial under the Seventh Amendment can in no wise be involved is apparent from the fact that the Circuit Court has sent the matter back for a new trial, thus preserving petitioner's right to a jury trial.

Statement of the Case

The plaintiff, Anthony Albanese, with eight other longshoremen, known as the No. 2 gang, had been working in the lower No. 2 hold of respondent's vessel since 8:00 A. M. (App. to Deft-Appellant's Brief, pp. 69a, 190a, 236a, 237a). During all of this time a hilo owned by petitioner-stevedore, which had been placed by petitioner in the lower No. 2 hold (App. to Deft-Appellant's Brief, pp. 237a, 238a) had been in continuous operation (App. to Deft-Appellant's Brief, pp. 69a, 170a). At about 10:45 A. M. a second gang of stevedores, comprised of 9 men, identified as the No. 7 gang, began working in the after half of the upper 'tween deck, employing another hilo owned by petitioner-stevedore, which had also been placed aboard to assist in the cargo operations at that level (App. to Deft-Appellant's Brief,

pp. 64a, 74a, 125a, 134a, 141a, 163a). This second hilo had been in operation for 10 to 15 minutes when the longshoremen in this gang, followed shortly thereafter by the longshoremen working in the lower No. 2 hold, began to make complaints of the density of smoke and fumes in the hold. Then, for the first time, was any request made for the ship's forced ventilating system to be put in operation (App. to Deft-Appellant's Brief, pp. 129a, 137a, 155a, 156a, 164a-165a, 171a, 267a-268a).

It is not true, as stated by petitioner, that there was unanimity of testimony that "until at least 10:45 A. M. the working conditions in the hatch were normal" (Petition, p. 5). The proof merely was that up until after the second hilo was put into operation at about 10:45 A. M. in the upper 'tween deck, no complaint had been made by any of the longshoremen working in the hold, nor any request made of the ship to put its blowers on.

The proof showed that petitioner-stevedore's ships's bosses assigned to the over-all supervision of the stevedoring operations on board ship (App. to Deft-Appellant's Brief, pp. 226a, 237a-238a), had been instructed and directed to make periodic tests of the atmosphere in the holds where hilos were working, for which purpose instruments were maintained by petitioner in the pier superintendent's desk on the pier (App. to Deft-Appellant's Brief, pp. 244a-248a).

There was testimony that at about 10:10 A. M. one of the stevedore bosses was observed in the lower No. 2 hold with this instrument, but whether he made any tests or what were the results of the tests was not disclosed. Neither of the stevedore's ship's bosses was called as a witness and no testimony was given explaining the failure to call them (App. to Deft-Appellant's Brief, pp. 150a, 172a-173a, 226a, 238a, 240a-241a, 244a-245a, 247a).

The petitioner maintained on the pier portable blowers for the purpose of exhausting fumes when hilos were work-

ing in the hold (App. to Deft-Appellant's Brief, pp. 242a, 243a). These blowers, under the instructions of the stevedore, were supposed to be put in operation whenever hilos were used (App. to Deft-Appellant's Brief, p. 243a). The proof, without contradiction, is that no portable blowers had been put in operation by petitioner, or even brought aboard the ship, prior to plaintiff's injury (App. to Deft-Appellant's Brief, pp. 135a-136a, 149a-150a, 154a, 166a, 172a).

All the conditions that existed in and about the hold had been created by the stevedore and obviously were known to it throughout its operation, including the circumstances that the after half of the upper 'tween deck was closed, that there was a rain tent over the hold and that the ship's blowers were not in operation (App. to Deft-Appellant's Brief, pp. 239a, 246a, 245a, 253a, 268a).

The proof showed that carbon monoxide does not become suddenly toxic and overpowering, but only produces its effects after continued exposure to a sufficiently high concentration over an extended period of time (App. to Deft-Appellant's Brief, pp. 81a, 83a, 102a, 103a). .01% is considered a safe working condition by the U. S. Department of Labor, and plaintiff's medical expert, Dr. Kaplan, testified that it requires an exposure to .2% for a period of an hour to make a person seriously ill (App. to Deft-Appellant's Brief, p. 83a).

There was conflict in the testimony as to whether any request was made to a ship's officer after 10:45 A. M. to turn on the ship's ventilating system. The ship's officer to whom the request was made and who allegedly told the longshoremen that he would turn on the ship's ventilating system and to keep the men working was identified only as one of the ship's mates, without regard to rank, name or other identification, other than that he weighed between 160 and 170, was middle aged and wore a uniform (App. to Deft-Appellant's Brief, pp. 127a, 128a, 140a).

The Fourth Mate, Ruter, who was assigned as cargo officer on the day in question to the forward holds including No. 2, denied that any such request was made of him (App. to Deft-Appellant's Brief, pp. 211a, 218a, 221a-222a, 223a-224a; cf. 267a-268a). He obviously did not fit the description of the person to whom the request was supposed to have been made, being a tall, thin, young man of 22 years of age. He also testified that none of the ship's officers fitted the description given by plaintiff's witnesses (App. to Deft-Appellant's Brief, p. 224a).

Under this set of facts the District Court gave the charge quoted at page 7 of the petition. It should be noted that there was in the case no evidence whatever that a ship's officer gave to the longshoremen any "added assurance that the dangerous condition would be promptly and entirely eliminated", as stated in the charge, and it should also be noted that while the charge is permissive to the extent that it allows the jury to "find that the stevedore acted to protect its men", it is mandatory in requiring the jury if they so find, to hold that "the shipowner is not entitled to recover indemnity". This portion of the charge, in addition to being at complete disparity with the evidence and unfounded, also confuses the stevedore's warranty to the shipowner with its duty to its own employees. The shipowner's right to indemnity "is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee." *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 131.

The substance of this charge clearly was that if the jury believed the testimony of the request to a ship's officer to put on the ventilating system, that as a concommitant thereof, with the implications which the Court attached to the conversation, although without support in the record, the stevedore must be absolved from liability to indemnify the shipowner.

That the Court of Appeals in referring to this instruction employed a condensed or shorthand method of reference

instead of quoting the instruction verbatim and taking it apart piece by piece cannot, it is submitted, justify the intemperate attack upon the judicial integrity of the Court of Appeals which petitioner has the temerity to make, by imputing to the Court of Appeals an absence of "fair play" and "a misreading of the record whether by carelessness or design" (Petition, p. 9). If there was any misrepresentation of the record in the present case, it was clearly done by the District Court rather than by the Court of Appeals.

Except for the dispute as to the request to a ship's mate to turn on the ventilating system, there was substantially no conflict in the evidence in this case and accordingly, for purposes of the appeal, to remove from consideration the possible contention that the respondent, as appellant in the court below, was seeking to have an appellate court weigh the evidence in a jury case, respondent made the statement as set forth in the petition at page 6. Contrary to the inference which petitioner seeks to create in its petition, the Court of Appeals accepted and took at face value the evidence against respondent in that respect, as is apparent from the quotation given by petitioner from the Court's opinion (Petition, p. 6).

Respondent has never conceded and does not concede that "the hatch boss and gangwayman *timely* complained to a ship's officer about the atmosphere in the hold", nor that they "were assured by the ship's officer that he would *rectify the situation*" (Petition, p. 7).

Argument

1. There is no question of sufficient importance for the granting of certiorari.

To liken the shorthand reference by the Court of Appeals to a clearly erroneous charge in large part unsupported by any evidence whatever in the case, to the conduct of

the Trial Court which this Court condemned in *Townsend* v. *Burke,* 334 U. S. 736, 740-741, is to say the least, shocking. Apparently petitioner feels frustrated because, having received from the District Court a charge allowing the jury to assume from the conversation with the ship's officer that the stevedore had been given "assurance that the dangerous condition would be completely and entirely eliminated" (Petition, p. 10), upon which it had obtained an unjustifiable verdict in its favor, it has been unsucceessful in defending this charge in the Court of Appeals. In consequence of that frustration, to charge the Court of Appeals with transgression of "civil rights" and "leapfrogging zeal to implement a mistaken concept of law" (Petition, p. 10) is to pass the bounds of all propriety.

It is not true that the stevedore's customer, the shipowner, directed it to do its work in a specific manner with which it supinely complied, as insinuated at page 10 of the petition; for the stevedore admitted its obligations to keep the hold area safe for the workmen (App. to Deft.-Appellant's Brief, pp. 245a-247a). All that is here involved is a contention by the stevedore that two of its subordinate employees made a request of a subordinate officer of the ship to turn on the ventilating system, that he agreed to do so and told the men to keep working. That this could constitute conduct preventing or hindering the performance by the stevedore of its contractual obligation to the shipowner is certainly not supported by anything contained in *Corbin on Contracts,* Sections 571, 947 and 1264, or *Restatement of Contracts,* Sections 295 and 315, cited by this Court in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.,* 355 U. S. 563, 567, footnote 6, and certainly it is a far cry from anything contemplated by the *New York Uniform Commercial Code,* Section 2-316 (Petition, p. 11).

2. The decision below is not in conflict with the holdings or principles enunciated by this Court.

In *Weyerhaeuser,* the District Court had directed a verdict in favor of the stevedore-third-party defendant against

the shipowner on the question of indemnity, where the shipowner had made available to the stevedore a winch shelter which had previously been erected on the vessel at a prior point of call. This Court, in reversing and sending back for jury consideration the question of the shipowner's right to indemnity, wrote as follows (*Id.*, p. 567):

> "If in that regard respondent rendered a substandard performance which led to foreseeable liability of petitioner, the latter was entitled to indemnity absent conduct on its part sufficient to preclude recovery. The evidence bearing on these issues—petitioner's action in making the shelter on its ship available to respondent's employees in Boston although it apparently was unsafe, as well as respondent's continued use of the shelter for five days thereafter without inspection—was for jury consideration under appropriate instructions."

In holding that there were questions for jury consideration, this Court, as might well be expected, cautioned "under appropriate instructions." What is involved in the present case is not whether third-party defendant has been deprived of due process, or jury trial, but whether the question of idemnification was submitted "under appropriate instructions." That is all that is involved, and since a new jury trial has been ordered, that is all that could possibly be involved.

It should, however, be noted that it is not true, as stated by petitioner at page 12 of the petition, that in *Weyerhaeuser* the stevedore *created* the "dangerous condition." The petitioner in that case was the shipowner, as is apparent from the foregoing quotation from that case. What this Court held was that the evidence bearing on the issue, whether the shipowner's "action in making the shelter on the ship available to" the stevedore's "employees in Boston, although it apparently was unsafe",

as well as the stevedore's "continued use of the shelter for five days thereafter without investigation" was for jury consideration under appropriate instructions. In the instant case the shipowner did not supply the hilos. There was no issue vis-a-vis the shipowner and the stevedore, whether the shipowner, because it had supplied defective equipment, could be entitled to indemnity from a stevedore who had continued to use it without inspection. Here the stevedore supplied the equipment, it was chargeable with knowledge of the conditions and it controlled the workmen.

Petitioner completely misapprehends the effect of this Court's decision in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U. S. 355 (Petition, pp. 11-12). In that case the Court did not hold that under no circumstances could a judgment of directed verdict be given in favor of the shipowner against the stevedore. There were two bases of liability upon which the ship, under the charge, might have been held at fault either for unseaworthiness or negligence, in either of which instance this Court indicated that the Circuit Court's decision granting a directed verdict in favor of the shipowner against the stevedore would have been justified. It was only the third possible ground of liability for unseaworthiness, namely, the defective bands which secured the bales of burlap, a condition not known to the stevedore, which this Court held could reconcile the jury's verdicts in favor of the plaintiff against the shipowner, and against the shipowner in favor of the stevedore.

It was only because there was a jury verdict on specific questions which, under the Seventh Amendment, must be sustained if reconcilable, that this Court reversed the Circuit Court of Appeals which had set aside the jury verdict in favor of the stevedore and directed judgment in favor of the shipowner. It is apparent, therefore, that petitioner's outbursts regarding a "burning desire of the

Court of Appeals for the Second Circuit to assert for itself the function of the jury and to impose liability on marine contractors", and "the supplanting of a jury by an appellate court is an invidious cancer which must be treated by this Court before it is completely metastasized" (Petition, p. 12), are entirely unwarranted.

3. The decision below is not in conflict with the decisions of other Courts of Appeals.

There is not the slightest conflict between the decision of the Court of Appeals in this case and the decisions cited by petitioner at pages 13 to 15 of its petition.

While *Moore-McCormack Lines, Inc.* v. *Maryland Ship Ceiling Co.*, 311 F. 2d 663, is concerned with the question of indemnity precluding conduct on the part of the shipowner, petitioner's analysis of that case gives a completely distorted view of the case by the elimination of the controlling factual elements upon which the decision in that case was based (Petition, p. 13). In that case the jury found that the presence of hydrogen cyanide gas in the cargo was such a latent or hidden danger as is not usually encountered by an expert and experienced ship ceiler, but was a condition of which the shipowner knew, or by the exercise of ordinary care should have known, and was not such a condition as the ship ceiling company by the exercise of reasonable care should have discovered. It was on the basis, and only on the basis of these specific findings of the jury, that the Court in that case sustained a verdict in favor of the ship ceiling company on the claim for indemnity. The principles applied by the Court in that case are in precise accord with the principles governing indemnity defeating conduct stated with a wealth of supporting authority in *Hugev* v. *Dampskisaktieselskabet International*, 170 F. Supp. 601, 610-611, aff'd sub. nom. *Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet International* (CA 9), 274 F. 2d 875, cert. den. 363 U. S. 803, cited

by this Court in *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U. S. 315, 323, footnote 9.

In *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional*, 294 F. 2d 32, the contract between the shipowner and the stevedore specifically required the shipowner "to supply 'booms and adequate winches, in good order and with sufficient steam or current for their efficient operation * * *'" (*Id.* p. 34). The evidence in that case showed that on complaint of the stevedore, the ship had undertaken to repair the winch (*Id.* p. 34). The accident happened after the very first or second attempt to raise a load following the repair (*Id.* p. 35). Again, as in *Weyerhaeuser*, the injury-causing defect was in equipment furnished by the vessel; but in addition, in *Hodgson*, the vessel owner was contractually obligated to keep the winch in good order and it actually made a repair to it with an assurance that the winch was then in good operating condition.

In *Torres Cruz* v. *Hudson Steamship Company*, 206 F. Supp. 216, aff'd sub nom. *Hudson S.S. Co.* v. *Ayala Colon*, 314 F. 2d 44, there had been repeated requests made for the repair of the winch, repeated effort at repair, reluctance on the part of the stevedores to continue working, and a definite request by the ship's first mate to nevertheless continue. The Court of Appeals for the First Circuit placed its affirmance upon the basis that the shipowner "had contracted to keep the winch in good repair or else furnish a substitute", and that after each repair was made the shipowner gave assurance to the stevedore that the winch was sufficiently repaired and instructed the stevedore to resume operations (314 F. 2d at p. 45).

In *United States* v. *Harrison*, 245 F. 2d 911, the deck of the ship was practically covered with oil, apparently from the crankcases of the jeeps which the stevedore was supposed to unload; the gang boss and walking boss of the stevedore appealed to officers of the ship to have the condition remedied; this was not done, but the bosses and

men were urged by these officers to hasten the unloading so that the ship could go somewhere else to load; the longshoremen were told if they were careful they could work the vessel and get it out so that no delay would be incurred; thus admonished, the longshoremen agreed not to stop work on account of the dangerous condition, but to proceed. Harrison was injured as a result of working in this accumulation of grease (*Id.* p. 912) .

None of the cases cited by petitioner bear the slightest resemblance to the case at bar. In none of them was the condition created by equipment owned and employed by the stevedore and under its control, as in the case at bar.

In *Italia Societa per Azioni de Navigazione* v. *Oregon Stevedoring Company, Inc.*, 376 U. S. 315, this Court as recently as March 1964, held that a stevedore could be held liable to indemnify a shipowner where it fails to "furnish safe equipment pursuant to its contract with the shipowner, notwithstanding that the stevedore would not be liable in tort for its conduct" (*Id.* p. 320). In the instant case, the injury-producing instrument was owned and controlled by the stevedore, and placed aboard the vessel for its own convenience in the loading of cargo. The stevedore had instruments for testing the carbon monoxide content of the air; its ship's bosses were required to use these instruments to ascertain the extent of the carbon monoxide concentration in the atmosphere; the stevedore was equipped with blowers to ventilate the holds and its instructions to its employees were to employ the blowers in holds while hilos were being used; it had knowledge of the conditions existing which might produce a heavier than normal concentration of carbon monoxide, such as the partly covered upper 'tween deck and the hatch tent over the hold. Cf. *Booth Steamship Co.* v. *Meier & Oelhaf Co.*, 262 F. 2d 310.

The only question presented is whether under those circumstances a request to a ship's officer to put on the ship's blowers at a time when the heaviness of fumes in the hold

had become sufficient to disturb the workmen, and his promise to do so, could be held to excuse the stevedore for breach of its warranty of workmanlike performance. Certainly no case cited by petitioner, and nothing contained in the decision of this Court in *Weyerhaeuser*, or any decision of the lower courts subsequent to *Weyerhaeuser*, justifies such a contention.

Even where the injury-producing condition is inherent in the structure of the ship itself, it has been held that indemnity may be had where the stevedore fails to observe the condition and allows its workmen to use the defective structure, *Smith* v. *Jugosalvenska Linijska Plovidea* (CA 4), 278 F. 2d 176. To the same effect, see also *Calmar S.S. Co.* v. *Nacirema Operating Co.*, 266 F. 2d 79, cert. den. 361 U. S. 816 and *American Export Lines* v. *Revel*, 266 F. 2d 82, 87.

Clearly there is no conflict between the instant decision and the decision of the Second Circuit in *Misurella* v. *Isthmian Lines, Inc.*, 328 F. 2d 40. In endeavoring to reach for such a conflict, petitioner refers to the decision of Judge Weinfeld in the District Court (215 F. Supp. 857), but fails to point out that Judge Weinfeld based his decision upon the premise that:

> "The warranty was effective the moment the stevedore boarded the vessel to perform its services. Indeed, the short of it is that if the hold was an unsafe area for the men to work in, or by the use of hi-los would be so rendered, they should not have been permitted to start the job until proper ventilation was in effect." (215 F. Supp. 862-863)

In affirming Judge Weinfeld's decision, the Circuit Court practically reiterated the language used in the present case, saying:

> "In any event, we should find insuperable difficulty to any holding that the owner here prevented or hindered

> a workmanlike performance by the stevedore, for the stevedore could itself have provided workable ventilating equipment as was often done where a ship failed to do so, or shut down the hi-los until the deck house key was produced." (328 F. 2d at p. 42)

In both *Misurella* and in the present case, requests were made of the ship's officers to turn on the ventilators. In neither case did the stevedore do more, and in both cases this has been held by the Court of Appeals to be insufficient to defeat indemnity, and, we submit, properly so under the doctrine of a stevedore's warranty of workmanlike service, as heretofore enunciated and applied by this Court.

4. No clarification of the type of conduct on the part of a shipowner which is sufficient to preclude indemnity is required.

Contrary to petitioner's suggestion, the lower courts have in innumerable instances, as is evident from the cases heretofore cited in this brief, found it possible to fashion a rule governing indemnity precluding conduct on the part of the shipowner without further clarification or further elaboration from this Court. Certainly nothing is contained in the cases cited by petitioner at pages 15 and 16 of its petition, to indicate any urging by the lower courts, that such clarification is necessary or desirable. In the District Court opinion in *Misurella* v. *Isthmian Lines, Inc.*, 215 F. Supp. 857, 861, Judge Weinfeld, following the quotation given by petitioner at page 16 of its petition, goes on to say, citing numerous cases in the footnotes: "The teaching of *Crumady* v. *The Joachim Hendrik Fisser* and its progeny is that the mere fact the shipowner was at fault does not, in and of itself, bar indemnity. Neither does the circumstance, as here argued by the stevedore, that the shipowner 'was at least a joint and concurring wrongdoer' defeat recovery."

In the affirmance of the *Misurella* decision, as above pointed out, the Circuit Court had no doubt whatever on the subject. Similarly in *McNamara* v. *Weichsel Dampschiffahrts,* 293 F. 2d 900, 903, where, under under a most peculiar fact situation, the Court made the comment stated by petitioner with respect to difficulties in determining what conduct is sufficient to defeat the right to indemnity and sent the case back for a new trial because improperly submitted to the jury on that issue; in affirming a judgment on retrial, the Court had no difficulty whatever in finding that the ship's conduct did not preclude indemnity, *McNamara* v. *Weichsel Dampschiffahrts,* 339 F. 2d 475.

There is nothing in the decision of the Court of Appeals in the instant case nor in the decision in *Mortensen* v. *A/S Glittre,* 348 F. 2d 383, cited by petitioner at page 16, to indicate any need or desire for clarification of this Court's decision in *Weyerhaeuser.* In any event, in the light of *Weyerhaeuser* and the cases which have applied its principle, the present case does not afford an appropriate medium for a clarification of the principle, if any should be desirable.

CONCLUSION

For the reasons above stated, the petition of International Terminal Operating Co., Inc. for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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On the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 654

N. V. NEDERL. AMERIK STOOMV. MAATS,

Petitioner,

against

ANTHONY ALBANESE and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Petitioner,

against

ANTHONY ALBANESE and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, N. V. Nederl. Amerik Stoomv. Maats., respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 15, 1965, which reversed the judgment entered in the United States District Court for the Southern District of New York on April 7, 1964 in favor of the plaintiff-respondent Anthony Albanese against petitioner, in the amount of $145,000.00, and in favor of third-party defendant-respondent International Terminal Operating Co., Inc., dismissing petitioner's third-party complaint for indemnity against that respondent and remanded both actions for retrial.

This petition is filed as a cross-petition to petitions heretofore filed herein by the respondent, Anthony Albanese,

for a writ of certiorari, which bears No. 523 on the Docket of this Court, and by respondent, International Terminal Operating Co., Inc., which bears No. 557 on the Docket of this Court.

The opinion of the Court of Appeals for the Second Circuit, filed June 15, 1965, is reported at 346 F. 2d 481.

Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1965. The time of this petitioner to file a petition for a writ of certiorari in this cause has been extended to October 18, 1965 by order of the Honorable John M. Harlan, Associate Justice of this Court, dated September 15, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254(1) and 2101(c).

Questions Presented

I

Does a ship become unseaworthy because an injury-producing condition is created within the hold of the vessel by the exhaust of hilos, not in themselves defective, placed within the hold by the stevedore for use in cargo loading operations?

Fairly comprised within this question are the following subsidiary questions:

(1) Are hilos so brought aboard a vessel adopted as a matter of law by the ship as its own equipment?

(2) Does the warranty of seaworthiness include the obligation to provide a longshoreman with a safe place to work?

(a) Under the reasonable fitness doctrine, can the hold of a vessel be found unseaworthy where only 1 of 18 men employed in the hold is affected by the exhaust and there is no proof that the carbon monoxide content of the hold exceeded allowable safe limits?

II

May a shipowner be held liable in negligence for failing to give a safe place of work to the employee of an independent contractor who is injured by reason of the methods employed by the independent contractor in performing its work?

III

Where a longshoreman is injured by carbon monoxide fumes exhausted from hilos employed by a stevedore in performing loading operations aboard a vessel, can the stevedore be relieved of the performance of its warranty of workmanlike service by belatedly requesting through subordinate employees that a vessel's forced ventilation system be put into operation after the workmen began to complain of the density of fumes and within fifteen minutes of the happening of the injury?

Statement of the Case

Respondent, Anthony Albanese, a longshoreman in the employ of respondent, third-party defendant, International Terminal Operating Co., Inc., claims that on February 25, 1961 he sustained personal injuries as a result of carbon monoxide poisoning while working in the lower No. 2 hold of petitioner's vessel, the M. S. SCHIEDYK.

The plaintiff, together with 8 other men, comprising the No. 2 gang, had been working in the lower No. 2 hold of the vessel since approximately 8:00 A. M. (App. to Deft.-Appellant's Brief, pp. 69a, 190a, 236a, 237a). During all

of this time a hilo, owned by third-party defendant, which had been placed in the lower No. 2 hold, had been in continuous operation (App. to Deft.-Appellant's Brief, pp. 69a, 170a, 237a-238a). At about 10:45 A. M. a second gang of stevedores, comprised of 9 men, identified as the No. 7 gang, began working a hilo in the after half of the upper 'tween deck (App. to Deft.-Appellant's Brief, pp. 64a, 74a, 125a, 134a, 141a, 163a). This second hilo had been in operation for 10 to 15 minutes when the longshoremen began to make complaints of the density of smoke and fumes in the hold. Then, for the first time, was any request made for the ship's forced ventilating system to be put in operation (App. to Deft.-Appellant's Brief, pp. 129a, 137a, 155a, 156a, 164a-165a, 171a). The entire time interval from the time the request was allegedly made until the plaintiff had been removed from the hatch was less than 15 minutes (App. to Def.-Appellant's Brief, pp. 131a, 136a, 138a, 139a).

The ship was euipped with a Cargo Caire system which is designed primarily for the ventilation and dehumidifying of cargo while the vessel is at sea with the hatches closed (App. to Deft.-Appellant's Brief, pp. 178a-179a, 60a). It can, however, serve as a forced ventilating system during the course of the loading of cargo (App. to Deft.-Appellant's Brief, pp. 209a, 60a, 251a-252a).

Third-party defendant maintained on the pier portable blowers for the purpose of exhausting fumes when hilos were working in the hold (App. to Deft.-Appellant's Brief, pp. 242a, 243a), and these blowers were, under the instructions of the stevedore, supposed to be put in operation whenever hilos were used (App. to Deft.-Appellant's Brief, p. 243a).

Third-party defendant's ship's bosses assigned to the over-all supervision of the steveloring operations on board ship (App. to Deft.-Appellant's Brief, pp. 237a-238a, 226a), had been instructed and directed to make periodic tests of

the atmosphere in the holds where hilos were working, for which purpose instruments were maintained by I.T.O. in the pier superintendent's desk on the pier (App. to Deft.-Appellant's Brief, pp. 244a-248a).

At about 10:10 A. M. one of the stevedore bosses was observed in the lower No. 2 hold with this instrument (App. to Deft.-Appellant's Brief, pp. 172a-173a), but whether he made any tests or what were the results of the tests was not disclosed.

It was stipulated that the Cargo Caire system was adequate for the ventilation of the hold (App. to Deft.-Appellant's Brief, pp. 253a-254a), and there is no proof whatever that the system was inoperable or in any wise defective. The proof without contradiction is that no portable blowers had been brought aboard the ship or put in operation by the third-party defendant prior to plaintiff's injury (App. to Deft.-Appellant's Brief, pp. 135a-136a, 149a-150a, 154a, 166a, 172a). It was stipulated that none of the longshoremen, other than the plaintiff, in either plaintiff's gang or the No. 7 gang made any claim of having been affected by carbon monoxide (App. to Deft.-Appellant's Brief, p. 130a). The stevedore's superintending personnel had no knowledge of any such incident (App. to Deft.-Appellant's Brief, pp. 240a-242a, 245a) and their record of the accident indicates merely that plaintiff was overcome as he was leaving the hold for lunch (Ex. F, reproduced at p. 283a, App. to Deft.-Appellant's Brief, introduced at p. 231a).

Carbon monoxide does not become suddenly toxic and overpowering but produces its effects after continued exposure to a sufficiently high concentration over an extended period of time (App. to Deft.-Appellant's Brief, pp. 81a, 83a, 102a, 103a). .01% is considered a safe working condition by the U. S. Department of Labor, and plaintiff's medical expert, Dr. Kaplan, testified that it required exposure to .2% for an hour to make a person seriously ill (App. to Deft.-Appellant's Brief, p. 83a).

Mechanical ventilating systems, such as the Cargo Caire system, are not usually or customarily required on cargo carrying vessels (App. to Deft.-Appellant's Brief, pp. 251a-252a). There is no such equipment on the many thousands of Liberty ships which are still in operation (App. to Deft.-Appellant's Brief, pp. 261a-262a). In the port of New York, it is customary for stevedoring companies to maintain their own portable blowers for the purpose of exhausting any fumes from hilos brought aboard vessels to assist in cargo loading and discharging operations (App. to Deft.-Appellant's Brief, p. 263a).

The Trial Court, denying defendant-petitioner's motion for a directed verdict against plaintiff (App. to Deft.-Appellant's Brief, pp. 269a-270a; cf. 184a-188a), submitted the case to the jury as between plaintiff and defendant on the issues of both negligence and unseaworthiness. As to seaworthiness, the question submitted to the jury was whether "there was a dangerous accumulation of carbon monoxide fumes in the No. 2 hold which rendered the vessel unseaworthy", and in that connection the jury was charged that they "must determine whether, considering the place and the nature of the work, the area was reasonably fit to permit the plaintiff to perform his tasks with reasonable safety" (App. to Deft.-Appellant's Brief, p. 19a). In this connection the Court also charged the jury that: "The hilos, though brought aboard by the longshoremen, are adopted as a matter of law by the ship as its own equipment" (App. to Deft.-Appellant's Brief, p. 20a), and that "the ship-owner's obligation to provide a seaworthy vessel includes the obligation to provide plaintiff with a reasonably safe place to work" (App. to Deft.-Appellant's Brief, p. 21a). The Court also charged that "failure by the shipowner to put such equipment (the ventilating system) in effective operation under the existing conditions which prevail here, if you so find, would warrant the finding by you that the vessel was unseaworthy" (App. to Deft.-Appellant's Brief, p. 21a).

On defendant-petitioner's motion for a directed verdict against third-party defendant in the event the jury should return a verdict in favor of the plaintiff, the Court, neither denying nor reserving, said: "The Court will deal with that matter in the course of the charge" (App. to Deft.-Appellant's Brief, p. 271a) In submitting the indemnity claim to the jury, the Court however left it to the jury as a question of fact whether or not the stevedore actually knew or should have known that the use of hilos would create a dangerous condition (App. to Deft.-Appellant's Brief, p. 31a) charging that: "Should you find that complaints were made to a ship's officer as soon as the dangerous condition was known or should reasonably have been known by the stevedore, and if you find that the ship's officer directed or requested the longshoremen to continue working under these conditions with the added assurance that the dangerous condition would be promptly and entirely eliminated, then you may find that the stevedore acted to protect its men; and, in that event, the shipowner is not entitled to recover indemnity" (App. to Deft.-Appellant's Brief, pp. 32a, 33a). There was no proof whatever of any assurance "that the dangerous condition would be promptly and entirely eliminated."

Reasons for Granting the Writ

A—As to unseaworthiness.

On the issue of unseaworthiness, the Court of Appeals held that there might have been evidence sufficient to base a verdict upon unseaworthiness, though not compelling such a verdict, on the theory that the ship had become unseaworthy "because of a dangerous condition created by noxious fumes in the hold" (346 F. 2d 481 at p. 483). In this respect the decision of the Court of Appeals is in conflict with the decisions of this Court in *Morales* v. *City of Galveston,* 370 U. S. 165, reh. den. 371 U. S. 853, and *Gutierrez* v. *Waterman S.S. Corp.,* 373 U. S. 206. In *Morales* this

Court specifically held that the condition of the atmosphere in the hold of the vessel, created by toxic fumes imported into the vessel by cargo which was in the process of being loaded, did not render the vessel unseaworthy even though the vessel had no mechanical ventilating equipment to exhaust fumes. The basis of the Court's decision apparently was that for unseaworthiness to exist, there must be a defect in the vessel itself, its hull, appurtenances, stow or personnel; that unseaworthiness does not consist of a condition *in* the vessel but a condition *of* the vessel. This is further emphasized by this Court in *Gutierrez,* wherein this Court, at page 213, wrote as follows:

> "These cases all reveal a proper application of the seaworthiness doctrine, which is in essence that things about a ship, whether the hull, the decks the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used."

In that case, distinguishing the decision of this Court in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.,* 369 U. S. 355, from *Morales,* this Court said (373 U. S. at p. 213, Footnote 4):

> "4. The Ellerman Case was cited with approval in the later decision, Morales v. Galveston, 370 U. S. 165, 170, and the majority of the Court in Morales, with one exception, joins the majority here. Morales, of course, did not involve the unseaworthiness of cargo containers, but rather that of a ship's hold."

In *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539, this Court carefully pointed out that the doctrine of unseaworthiness does not rest upon tort notions of knowledge or notice, actual or constructive, but solely and exclusively upon the existence of a condition which can be held to constitute unseaworthiness within the meaning of the term as defined in the case law.

If by reason of the existence of toxic fumes and the absence of mechanical ventilating equipment to keep the hold free of such fumes, the vessel was not unseaworthy in *Morales*, upon what basis can the vessel be held to have been unseaworthy in the present case?

The test of seaworthiness, as stated by this Court in *Mitchell*, *Morales*, *Ellerman* and *Gutierrez*, is reasonable fitness. If a vessel which had no mechanical ventilating equipment was nevertheless reasonably fit in *Morales*, how can a vessel which had adequate ventilating equipment be not reasonably fit in the case at bar? Unseaworthiness cannot be imputed, although so charged by the District Court in this case, from the mere fact that the ventilating equipment was not put in use, for liability in that respect involves concepts of negligence, not of unseaworthiness. Cf. *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96; *Ezekiel* v. *Volusia S.S. Co.* (CA 2), 297 F. 2d 215, cert. den. 369 U. S. 843; *Pinto* v. *States Marine Corp. of Del.* (CA 2), 296 F. 2d 1, cert. den. 369 U. S. 843, reh. den. 369 U. S. 891; *Imperial Oil Ltd.* v. *Drlik* (CA 6), 234 F. 2d 4, cert. den. 352 U. S. 941.

If any unfit condition existed in the hold under the proof in this case, it is beyond contradiction that the condition did not exist at the commencement of the work, but arose at a subsequent period of time by reason of the use by the stevedore of hilos in the performance of its work.

Under these circumstances, the only basis upon which the shipowner could be held liable for unseaworthiness is that either the hilos brought aboard a vessel are adopted as a matter of law by the ship as its own equipment, or because the warranty of seaworthiness includes an absolute obligation to provide a longshoreman with a safe place to work, which are precisely the bases upon which the District Court instructed the jury that unseaworthiness could be found in the case at bar.

While it is true that in *Alaska S.S. Co.* v. *Petterson*, 347 U. S. 396, the ship was held to be unseaworthy where equipment brought aboard by a stevedore was actually incorporated into and made a part of the ship's equipment, this decision has not been understood or interpreted as extending to equipment employed by stevedores not integrated with the ship's own equipment. *Forkin* v. *Furness Withy & Co.* (CA 2), 323 F. 2d 638, *Carabellese* v. *Naviera Aznar, S.A.* (CA 2), 285 F. 2d 355, cert. den. 365 U. S. 872; *McKnight* v. *N. M. Paterson & Sons, Limited*, 181 F. Supp. 434, aff'd (CA 6), 286 F. 2d 250, cert. den. 368 U. S. 913; *Sherbin* v. *S. G. Embiricos, Ltd*, 200 F. Supp. 874; *Deffes* v. *Federal Barge Lines, Inc.*, 229 F. Supp. 719.

The principle is also widely recognized that where an injury to a longshoreman results from the stevedore's handling of equipment which is not in itself defective if properly handled, the ship is not liable under the unseaworthiness doctrine. *Mosley* v. *Cia. Mar Adra, S.A.* (CA 2), 314 F. 2d 223, cert. den. 375 U. S. 829, 835; *Puddu* v. *Royal Netherlands S.S. Co.* (CA 2), 303 F. 2d 752, cert. den. 371 U. S. 840, reh. den. 371 U. S. 917; *Bilieci* v. *United States* (CA 9), 298 F. 2d 703; *Morrell* v. *United States* (CA 9), 297 F. 2d 662; *Arena* v. *Luckenbach S.S. Co., Inc.* (CA 1), 279 F. 2d 186, cert. den. 364 U. S. 895.

In the instant case the hilos concededly were not in themselves defective in any way so as to render the ship unseaworthy, even if they could be assumed to be incorporated into and made a part of the ship's gear. It would appear, therefore, that the only way in which the ship could be held liable for unseaworthiness in the instant case would be that the shipowner owes to a longshoreman an absolute obligation to provide him under any and all circumstances with a safe place of work. The notion that there can be any absolute obligation on the part of a shipowner to furnish workmen of an independent contractor with a safe place of work was conclusively set at rest by

this Court in *West* v. *United States*, 361 U. S. 118, when it said (p. 122): "Other than the doctrine of seaworthiness, * * * there is no basis of liability apart from fault."

To import unseaworthiness from the mere fact that the longshoreman's place of work becomes unsafe, would make a vessel owner the guarantor or insurer of the safety of employees of an independent contractor, even though the independent contractor, by its own methods of work, renders the work place unsafe and even though the unsafe condition in no way affected the vessel, its hull, decks, machinery, fixtures, appurtenances, cargo stow or cargo containers. This would be an incredible rule of law, and yet that is precisely the burden which is imposed upon the shipowner in the present case under the charge of the District Court (App. to Deft.-Appellant's Brief, p. 21a).

In the present case the plaintiff was the only one of 18 men employed in the hold who claims to have been affected by the carbon monoxide. There was no proof as to what the carbon monoxide content of the hold was, or that it had exceeded allowable safe limits. The doctrine of unseaworthiness imports no more than that the vessel owner must supply a ship reasonably fit for the purposes of its intended use. The test is not whether a vessel is reasonably fit for a particular longshoreman with whatever his idiosyncrasies or susceptibilities to injury; yet in the present case the charge of the District Court to the jury allowed them to find unseaworthiness proximately causing plaintiff's injury if in fact the area was not "reasonably fit to permit plaintiff to perform his tasks with reasonable safety" (App. to Deft.-Appellant's Brief, p. 19a). This is a test, not of reasonable fitness for intended use, but of reasonable fitness for a particular person. The proof shows that carbon monoxide may have varying effects on different persons according to a person's own peculiarities.

B—As to a safe place of work.

Whether or not, as stated by the Court of Appeals, a finding of defendant's negligence would be justified "if the hatch bosses sometime between 10:55 and 11:05 A. M. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so" (346 F. 2d at p. 483), the fact is that the case was not submitted to the jury on any such basis, and that no request was made by the plaintiff to submit the case on any such basis. The only and sole basis upon which the case was submitted to the jury in negligence was that the shipowner owed to the plaintiff "the duty to use reasonable care to see that the hold area was a reasonably safe place in which to work" (App. to Deft.-Appellant's Brief, p. 14a-15a).

That there is no such duty upon a shipowner in respect of an employee of an independent contractor who has been employed by the shipowner to perform specific services on the vessel, where the injury arises out of the methods employed by the independent contractor, has been adjudicated by this Court in *West* v. *United States,* 361 U. S. 118, 123. This has consistently been the rule of law in negligence enunciated by the Court of Appeals for the Second Circuit over a long period of time, as to which this Court has consistently denied certiorari. *Gallagher* v. *United States Lines,* 206 F. 2d 177, cert. den. 346 U. S. 897, reh. den. 346 U. S. 940; *Filipek* v. *Moore-McCormack Lines, Inc.,* 258 F. 2d 734, cert. den. 359 U. S. 927; *Puddu* v. *Royal Netherlands S.S. Co.,* 303 F. 2d 752, cert. den. 371 U. S. 840, reh. den. 371 U. S. 917. This is also the ordinary common law rule. *Hess* v. *Bernheimer & Schwartz Brewing Co.,* 219 N. Y. 415, 418-419; *Iacono* v. *Frank & Frank Contracting Co.,* 259 N. Y. 377, 381; *Gallagher* v. *United States Lines,* 206 F. 2d 177, 179; *Wallach* v. *United States,* 291 F. 2d 69, 70, cert. den. 368 U. S. 935; *Zucchelli* v. *City Construction Co.,* 4 N. Y. 2d 52; *Gasper* v. *Ford Motor Co.,* 13 N. Y. 2d 104; *Wright* v. *Belt Associates, Inc.,* 14 N. Y. 2d 129, 134.

C—As to indemnity.

A stevedore's implied warranty of workmanlike performance is absolute and is imposed whether a stevedore's conduct would render it liable in tort or not. *Italia Societa per Azione de Navigazione* v. *Oregon Stevedoring Company, Inc.*, 376 U. S. 315. In that case this Court held the stevedore liable to indemnify the shipowner where one of its employees was injured without any negligence on its part, by reason of a defective rope supplied by the stevedore, attached to a hatch tent, even though the stevedore had no knowledge of the defect, citing *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 and *Crumady* v *The Joachim Hendrik Fisser*, 358 U. S. 423. This Court in *Italia* held that the stevedore's warranty "extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto" and that "the shipowner's negligence is not fatal to recovery against the stevedore" (*Id.*, pp. 319-320).

In *Italia*, as in the landmark case in the field of maritime indemnity of *Ryan* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124, this Court likened the stevedore's warranty of workmanlike service to "a manufacturer's warranty of the soundness of its manufactured product" (*Id.* p. 318).

In view of the nature of the stevedore's warranty of workmanlike service, it would seem clear beyond peradventure of dispute that in the instant case, if any basis existed for holding the shipowner liable, either in negligence or in unseaworthiness, an even wider basis existed to entitle the shipowner to indemnity from the stevedore as a matter of law. If the stevedore is held liable to indemnify the shipowner where an instrumentality supplied by it is defective, even though it has no knowledge thereof, how can a stevedore escape liability where it is itself not free from fault, the instrumentality which causes the injury is furnished by it, and the injury-producing conditions should have been known to it if attentive to its obligations?

While it is true that in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, this Court indicated that there is an area of "conduct on (the shipowner's) part sufficient to preclude recovery", it is quite clear from *Crumady* that not even the giving to the stevedore of unseaworthy or defective equipment for use in its work will defeat indemnity. It has been consistently held that this is insufficient to defeat indemnity where the stevedore knew, or should have known, of the defect. *Revel* v. *American Export Lines,* 162 F. Supp. 279, aff'd 266 F. 2d 82 (CA 4), cited by this Court in *Italia* (Footnote 9, p. 323); *Calmar S. S. Co.* v. *Nacirema Operating Co.* (CA 4), 266 F. 2d 79, cert. den. 361 U. S. 816; *Smith* v. *Jugosalvenska Linijska Plovidea* (CA 4), 278 F. 2d 176; *Drago* v. *A/S Inger* (CA 2), 305 F. 2d 139; *Pettus* v. *Grace Line, Inc.* (CA 2), 305 F. 2d 151; *Williams* v. *Pennsylvania R. R. Co.* (CA 2), 313 F. 2d 203; *Misurella* v. *Isthmian Lines, Inc.* (CA 2), 328 F. 2d 40.

The area of conduct on the part of the shipowner which can defeat indemnity, as set forth in *Hugev* v. *Dampskisaktieselskabet International* v. *Metropolitan Stevedore Co.*, 170 F. Supp. 601, aff'd 274 F. 2d 875, cert. den. 363 U. S. 803, cited by this Court in *Italia* (Footnote 9, p. 323), is limited to failure to exercise reasonable care to place the ship, its equipment and appliances in such condition that an expert and experienced stevedore will be able by the exercise of ordinary care to load cargo with reasonable safety, and to give the stevedore reasonable warning of the existence of any latent or hidden dangers not usually encountered or reasonably to be expected by an expert and experienced stevedore, of which the shipowner had or should have had knowledge and which the shipowner could reasonably expect the stevedore to encounter in the performance of its work (170 F. Supp. at pp. 610-611).

Thus the cases where a shipowner has been denied indemnity fall into two categories:

(1) Those where the shipowner has failed to give warning relating to a hidden danger such as is not usually encountered by an expert and experienced contractor, of which the shipowner knew or should have known, and which the contractor, by the exercise of reasonable care, could not have discovered, as in *Moore-McCormack Lines, Inc.* v. *Maryland Ship Ceiling Co.*, 311 F. 2d 663.

(2) Those where there is a defect in ship's hull or equipment which the shipowner is required to keep in good condition and where there is given assurance by the ship that the equipment is in safe condition for use, as in *Hudson S. S. Co.* v. *Ayala Colon* (CA 1), 314 F. 2d 44, *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional* (CA 3), 294 F. 2d 32 and *United States* v. *Harrison* (CA 9), 245 F. 2d 911.

In the present case, we have on the contrary a condition of the longshoremen's work area created by instrumentalities provided by the stevedore, the effects of which were either known, or should have been known, to the stevedore, the testing of the harmful effects of which was a prescribed obligation imposed by the stevedore upon its supervisory personnel on board the ship, and for the prevention of which harmful effects the stevedore maintained preventive means in the way of portable blowers which, according to its prescribed procedures, were always and without variation supposed to have been placed at hatches every time a hilo was employed in a hold.

To argue that a belated request by subordinate employees to a mate to put on the ship's forced ventilating system within 15 minutes prior to the time that plaintiff was overcome by the carbon monoxide fumes and after they must already have had injurious effects, creates an issue of fact as to whether the shipowner prevented or hindered the stevedore in the performance of its warranty of workmanlike service, is manifestly unsound. If a stevedore could so escape the effect of a clear breach of its warranty, the warranty would be meaningless. It is submitted that as a

matter of law, such evidence was insufficient to create a jury question whether the shipowner was chargeable with conduct precluding indemnity.

The use of hilos in the holds of vessels is a comparatively recent innovation in the stevedoring industry, resulting from the constantly accelerating process of automation. The incidents of injury from their use can be expected to increase. It is important to the shipping industry to know whether the use of these or other such instruments by stevedores is to have the effect of further enlarging the heavy burden of responsibility already imposed upon the shoulders of shipowners in respect of the employees of their stevedore contractors. If certiorari should be granted in the case, the questions propounded by cross-petitioner should be reviewed by this Court.

There were two other questions raised by petitioner as appellant in the United States Court of Appeals which, because of the decision ordering a new trial, it did not become necessary to pass upon: (a) excessiveness of the plaintiff's verdict and (b) petitioner's right to counsel fees and expenses from third-party defendant, which, in the event this Court should grant certiorari and either modify or reverse the decision of the Court of Appeals, might require disposition by that Court.

CONCLUSION

In the event certiorari is granted in this case, the Court should consider upon its review of the case the questions presented by cross-petitioner.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 523

ANTHONY ALBANESE,

Petitioner,

—against—

N.V. NEDERL AMERIK STOOMV. MAATS,

Respondent,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Co-Petitioner.

REPLY BRIEF OF PETITIONER ALBANESE

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REPLY BRIEF OF PETITIONER ALBANESE

Respondent persists in its refusal to cite or understand pertinent decisional authority by this Court. It seeks to justify the errors in the opinion below by citing inapposite cases and by quoting decisional law almost completely out of context. Our reply shall be brief on some of respondent's misunderstanding of maritime decisional law since *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872 (1956).

Though the issues are simple, the effect of the opinion below is far reaching and will seriously disrupt the uniformity of maritime law with respect to the meaning of maritime negligence, and the intended use of the safety regulations for longshoring promulgated by the U. S. Dept. of Labor as standards of safety.

Simply stated, the issues and positions of the parties are:

1. Does the definition of maritime negligence, as with the definition of any negligence, include constructive notice for liability as to what a shipowner should have known and done in the exercise of reasonable care? Petitioner answers "yes". Respondent and the Court below answer "no", confusing active supervision, which was not charged, with the exercise of reasonable care on what the shipowner knew or should have known, which was charged.

2. Is petitioner's status as a longshoreman different in the remedies and obligations owed him by a shipowner from that of a social guest or repairman, when his injuries are sustained while doing a seaman's work on board a vessel in navigable waters? Petitioner answers "yes". Respondent answers "no". The Court below agrees with respondent by relating longshoremen's rights in negligence to repairmen not doing seaman's work, and workers on so-called "dead ships", and in fact discriminating against petitioner by limiting a longshoreman's cause in negligence to only actual notice of danger to the shipowner.

3. Is the Fourth Circuit's *Provenza* v. *American Export Lines, Inc.*, 324 F. 2d 660 (1963), cert. denied 376 U. S. 952, in direct conflict with the opinion below, which pointedly has no mention of the *Provenza* case, though thoroughly briefed by the parties? Petitioner answers "yes". Respondant refers to dicta out of context to say "no". The Court below unequivocally holds against the *Provenza* principles by stating the safety regulations are not relevant and confusing to a jury.

I.

Petitioner's status as a longshoreman is erroneously confused with that of a social invitee; petitioner is not less deserving than a social invitee of an instruction on maritime negligence to include constructive notice.

The status of petitioner is the question on which the parties initially disagree. Respondent relies on authorities which are not concerned with longshoremen doing work traditionally done by seamen, and cites this Court's *Kermarec* v. *Comp. Gen. Trans. Atlantic,* 358 U. S. 625, 79 S. Ct. 406 (1959) to equate petitioner's status with that of a social visitor aboard a vessel. This Court clearly noted that *Kermarec* "was not a member of the ship's company, nor of that broadened class of workmen to whom the admiralty law has latterly extended the absolute right to a seaworthy ship . . . Kermarec was aboard not to perform ship's work, but simply to visit a friend" (p. 629 of 358 U. S.). There was no need for direct reference to the different nondelegable obligation in maritime law obliging the shipowner to provide a safe place to work for longshoremen. In footnote 3 of *Kermarec,* supra, this Court included constructive notice in the definition of negligence, where liability was prompted by a canvas defectively tacked which caused the dangerous condition "of which the shipowner's agent would have known in the exercise of ordinary care. By its verdict, the jury found that much and more" (p. 630 of 358 U. S.). To reverse a general jury verdict on erroneous principles of law is equivalent to a denial of due process. Such was done here.

Apparently respondent has not read footnote 9 of this Court's opinion in *Kermarec,* supra where the following salient distinction is drawn: "This is not to say that con-

cepts of status are not relevant in the law of maritime torts, but only that the meaningful categories are quite different", citing *Seas Shipping Co.* v. *Sieracki,* supra, as to those doing a "seaman's work and incurring a seaman's hazards" (p. 632 of 358 U. S.).

The contested instruction by the trial Court below, which included constructive notice as part of the definition of maritime negligence, predicated on reasonable care, should apply no less to a longshoreman than to a social invitee. But it is obviously clear that an obligation of a shipowner to provide a reasonably safe place to work is a non-delegable and continuing duty owed to longshoremen, pro hac vice seamen, and applies to longshoremen in a different maritime category with different maritime rights. So did this Court hold recently in *Gutierrez* v. *Waterman Steamship Corp.,* 373 U. S. 206 at pp. 210, 211, 212.

Inapposite cases on specialists and boom riggers cannot divert truth from the distinction between those doing seaman's work on a vessel in navigable waters and those otherwise employed. Control of the impact zone is not essential for shipowner negligence, and as this is so, how can the absence of active supervision over a dangerous condition without the shipowner's actual knowledge make any difference to liability for maritime negligence? Where the Court below found evidence sufficient to find unseaworthiness "because of a dangerous condition created by noxious fumes in the hold" (p. 483 of 346 F. 2d), it must follow that here there was also evidence sufficient for negligence.

II.

The Fourth Circuit's *Provenza* case is in direct conflict with the opinion below.

Respondent strangely contends *Provenza* v. *American Export Lines, Inc.*, supra, is consistent with the reversal below. Nothing can be further from the truth once the conclusion and the pertinent reasoning of the Court of Appeals for the Fourth Circuit are understood. The majority opinion, after stating that a violation of the regulations would prompt a shipowner's liability, goes on to state: "We are unable to escape the conviction that it was error for the court not to read the regulations as requested and charge the jury that they were binding in law" (p. 665 of 324 F. 2d).

The Fourth Circuit opnion clearly held that if a stevedore violated the safety regulations, this would be negligence of the shipowner, if "known, or by the exercise of reasonable care should have been known to the shipowner . . ." (p. 665 of 324 F. 2d), and assesses the safety regulations as prescribing a standard of safety, not a new duty: "Nothing in the regulation forbids its being mentioned to the jury" (p. 666 of 324 F. 2d). Safety standards are relevant and the capacity of a federal jury to understand has been emphasized by this Court. See: *Salem* v. *U. S. Lines Co.*, 370 U. S. 31 (1962). The error in reversing petitioner's judgment below is compounded where the record shows the safety regulations in question were actually read to the jury by other counsel, particularly respondent's, and not by petitioner's counsel (pp. 248a to 250a, 254a to 260a of defendant-appellant's appendix to brief below).

CONCLUSION

The novel and retrogressive definition of maritime negligence which excludes constructive notice must alert the Court in its paramount authority to provide uniformity in maritime law. Where there is a conflict between two circuits, apparent in the difference between the instant decision and *Provenza, supra,* all Courts litigating maritime cases must be guided by the direction and reasoning of this Court, not by the clearly erroneous and pre-*Sieracki* limitations set forth by the Court below.

For these reasons and those set forth in the petition, the totally and permanently crippled petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit, or that the Court below be summarily reversed as in *Palermo* v. *Luckenbach Steamship Co.,* 355 U. S. 20, and the judgment based on a jury verdct for petitioner be reinstated.

Respectfully submitted,

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N. V. NEDERL. AMERIK STOOMV. MAATS. and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

PETITION FOR REHEARING

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I—By this Court's decision reversing the judgment of the Court of Appeals in this case and reinstating the District Court's judgment in favor of Albanese, this Court has summarily and without plenary consideration in effect reversed a long line of decisions of the Court of Appeals for the Second Circuit which have heretofore been approved by this Court 1

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 523

ANTHONY ALBANESE,

Petitioner,

against

N. V. NEDERL, AMERIK STOOMV. MAATS. and INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

PETITION FOR REHEARING

Respondent N. V. Nederl. Amerik Stoomv. Maats. hereby petitions this Court for a rehearing of the decision of this Court in this matter dated December 13, 1965, or in the alternative, for a modification of said decision for the reasons set forth below:

I

By this Court's decision reversing the judgment of the Court of Appeals in this case and reinstating the District Court's judgment in favor of Albanese, this Court has summarily and without plenary consideration in effect reversed a long line of decisions of the Court of Appeals for the Second Circuit which have heretofore been approved by this Court.

The Court of Appeals specifically set aside the judgment and remanded the case to the District Court for retrial of plaintiff's case because the District Court had charged the jury that it could find against the defendant on the basis of negligence "even if it did not have actual knowl-

edge of an unsafe condition in the hold, if the jury determined that such a condition existed for a sufficient length of time to charge the shipowner with notice of it and the shipowner did not act to prevent injury." The Court of Appeals reasoned that: "This was erroneous, for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that he actively supervise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist." (Petition of Albanese, App. B, p. 23, 346 F. 2d 481, 483). The Court of Appeals cited in support of this reasoning, *Berti* v. *Compagnie de Navigation,* 213 F. 2d 397, and *Filipek* v. *Moore-McCormack Lines, Inc.,* 258 F. 2d 734, cert. den. 359 U. S. 927. The decision of the Court of Appeals in this respect is consistent with and was required by a long line of decisions in the Second Circuit running back for more than a decade, which this Court has repeatedly refused to review, including *Gallagher* v. *United States Lines,* 206 F. 2d 177, cert. den. 346 U. S. 897, reh. den. 346 U. S. 940; *Oblatore* v. *United States,* 289 F. 2d 400, 402; *Puddu* v. *Royal Netherlands S.S. Co.,* 303 F. 2d 752, 753, cert. den. 371 U. S. 840, reh. den. 371 U. S. 917; *Forkin* v. *Furness, Withey & Co.,* 323 F. 2d 638, 640.

This Court gave approval to these decisions of the Second Circuit by citing *Filipek* v. *Moore-McCormack Lines, Inc., supra,* as indicative of the rule applied by the Courts of Appeal in *West* v. *United States,* 361 U. S. 118 at page 123, where this Court itself announced an identical rule. In *West* (361 U. S. at p. 124), this Court specifically distinguished the rule there announced from the contrary rule enunciated by it in *Halecki* v. *United N.Y. and N.J. Pilots Assn.,* 358 U. S. 613, where the shipowner *required* the contractor to employ a highly dangerous instrumentality.

When this Court in its decision herein stated "that the judgment of the Court of Appeals setting aside the judg-

ment for petitioner Albanese on the grounds that the trial court incorrectly charged the jury on the issue of negligence is erroneous''; this Court in effect held that a shipowner may be held liable in negligence for its failure to ''actively supervise the stevedore's work'' and ''take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist.'' If that was the intent of the Court in the present case, the present decision summarily, without plenary consideration, reverses the rule of decision of the above cited cases heretofore specifically approved by this Court in *West*.

Whether or not there may have been within the context of this case a sound basis for holding the shipowner liable for negligence, the fact remains that the basis of the Circuit Court's setting aside the judgment and remanding the case for a new trial, was the charge of the trial court in allowing the defendant shipowner to be held liable for constructive notice of an unsafe condition created in the hold by the use by the stevedore of a hilo. It is respectfully submitted that this Court's summary reversal of the Court of Appeals in that respect will at least lead to doubt and confusion as to the applicability of the rule of decision enunciated in the foregoing cited cases and heretofore approved by this Court in *West*, and that for this reason a rehearing should be granted so that plenary consideration of this issue can be had.

II

In reinstating the judgment of the District Court in favor of Albanese, this Court has precluded petitioner from having a determination by the Court of Appeals of the question raised by it in that Court of the excessiveness of the verdict in this case.

On its appeal to the Court of Appeals in this case, petitioner as appellant in that Court, raised the contention that the verdict of the jury in this case was excessive. Petitioner

argued the point to considerable extent, pointing to circumstances at the trial which tended to create a gross exaggeration of the effect of the injuries in the minds of the jurors. This point was not passed upon by the Court of Appeals as obviously it became moot in view of the decision of the Court of Appeals setting aside plaintiff's judgment and remanding the case to the District Court for a new trial. Now that this Court has determined that plaintiff is entitled to a judgment in his favor, by reinstating the judgment of the District Court, this Court has precluded petitioner from having consideration by the Court of Appeals of the question of the excessiveness of the verdict.

This is a real and serious question in this case. Without going into the merits of the contention more extensively than would be here justified, petitioner would point out that plaintiff was at the time of his accident a 51-year-old man who was previously impaired by a hearing loss not related to the accident (61a, 121a, 113a, 116a-120a).* He was confined to the hospital for 47 days (121a-122a) and was discharged with a final diagnosis of carbon monoxide poisoning accompanied by cerebral edema and hyperemia (112a). He remained under intermittent medical treatment until May 1963 (122a-123a). The accident occurred in February 1961. There was evidence of blacking out on July 24, 1961 when plaintiff was working over a barbecue pit which caused him to sustain burns on his right hand (87a, 122a-123a). His medical expenses amounted to approximately $3,000.00 (189a). His highest rate of earnings prior to the accident amounted to approximately $8,000.00 a year (125a). There was medical opinion that, based upon a continuance of his subjective complaints, he was permanently disabled from doing the kind of work he had previously done, but no suggestion whatever that he

* All the references in this point are to the Appendix to Defendant-Appellant's Brief in the Court of Appeals.

was entirely incapable of doing any other kind of work (96a, 110a, 111a).

In summation plaintiff's counsel referred to the plaintiff as a man who had a burden "to become a vegetable for the rest of his life" (273a), and in fact pleaded to the jury to penalize the defendant to prevent recurring injuries to longshoremen required, as plaintiff's counsel put it, to go "down into the black hole of Calcutta and barely come out with his life" (272a). Counsel's inordinate and exaggerated statements were given further emphasis by the Trial Court in the charge to the jury that plaintiff's claim was that he was converted from "a fairly vibrant life of activity into the energyless status of mere existence, forever incapable of doing a day's work, sick and frustrated by reason of various forms of disability which will persist for the remainder of his life and which were induced and aggravated by the accident" (22a) and again, later in the charge: "* * * that the proof warrants your finding that he is now and always will be slumping through life, that in his case there are no compensatory physical functions upon which he can rely so that life can have meaning for him" (25a). No such description of plaintiff's injuries or consequences of the accident was justified by the evidence. Exception was duly taken (37a).

A verdict of $145,000.00 in this case, it is respectfully submitted, is so shocking that to preclude petitioner from consideration of the question of excessiveness by the Court of Appeals, which is the effect of this Court's decision, would constitute a serious miscarriage of justice. That a retrial may be ordered on the sole issue of damages now appears to be well-settled. *Mason* v. *Mathiasen Tanker Industries, Inc.*, 298 F. 2d 28, cert. den. 371 U. S. 828; *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494; Rule 59(a) F.R.C.P., 28 U.S.C.

III

In view of the reinstatement of the judgment in favor of Albanese, petitioner should be granted an opportunity to have considered by the Court of Appeals the question raised by it in its appeal to the Court of Appeals, that it was entitled to a directed verdict in its favor against third-party defendant which, because of the decision of the Court of Appeals on the main case, became moot.

In the Court of Appeals petitioner had argued that it was entitled to a directed verdict of indemnity against third-party defendant. In view of the fact that the Court of Appeals had reversed the judgment in favor of plaintiff and remanded the case to the District Court for retrial, judgment in favor of petitioner under its third-party complaint could not be directed, even though petitioner had preserved its right to such a judgment by moving for judgment n.o.v. against third-party defendant in the District Court. The question of indemnity upon retrial would necessarily have to be determined within the context of the proof presented upon the retrial. *Fatovic* v. *Nederlandsche-Ameridaansche Stoomvaart, Maatschlappij* (CA2), 275 F. 2d 188, 191; *Bordas & Company* v. *Pizzaro Serrano* (CA 1), 314 F. 2d 291.

Now that this Court has reinstated plaintiff's judgment, petitioner's right to a directed verdict of indemnity against third-party defendant, International Terminal Operating Co., Inc., must be determined within the context of the present record. The Court of Appeals has held that the conversation of the two longshoremen with the ship's officer requesting him to put on the blowers and his failure to do so would not constitute conduct on the part of the shipowner sufficient to preclude petitioner from indemnity (Opinion of Court of Appeals, Appendix B to Petition of Albanese, pp. 25-26, 346 F. 2d 481, 484). This Court has

denied the petition for certiorari of International Terminal Operating Co. claiming error of the Court of Appeals in this respect. This was the only disputed issue in this case on the question of indemnity.

In the present case there is no conflict whatever in the proof that the stevedore owned and supplied the hilos; that it had control over both the hilos and the longshoremen who worked in the hold; that it had knowledge of all of the conditions of the work area that would affect conditions down in the hold, namely, that the after half of the upper 'tween deck was closed, that there was a rain tent over the hold and that the ship's blowers were not in operation; that it maintained portable blowers for use in exhausting hilo fumes from the hold and instruments for testing the contents of carbon monoxide in the hold; that no request had been made by anyone to put the ship's blowers in operation until about 15 minutes prior to plaintiff's injury when the request was made to a ship's officer; that the longshoremen in the lower hold had been working continuously in that hold with a hilo in operation since about 8 o'clock in the morning; that a second gang of longshoremen was sent into the after part of the 'tween deck where another hilo was put in operation by the stevedore at about 10:45 A. M. without any request having been made to the ship to put its blowers in operation and without any blowers being placed in the hold by the stevedore; that the request to a ship's officer to turn on the ship's blowers was not made until 10 or 15 minutes thereafter. Since the Court of Appeals has held that this would not be sufficient to absolve the stevedore from its obligation to indemnify the shipowner, it would appear that there is no question for retrial on the issue of indemnity if the judgment in favor of the plaintiff is sustained.

In the interest of judicial economy and to avoid what might well prove to be a needless retrial of the case as

between third-party plaintiff and third-party defendant, it is submitted that this case should be remanded to the Court of Appeals to enable it to determine whether, within the context of the proof in this case, petitioner and third-party plaintiff is entitled to a directed verdict in its favor against International Terminal Operating Co., Inc., third-party defendant. The relief herein sought is consistent with the action taken by this Court in *Palermo* v. *Luckenbach Steamship Company,* 355 U. S. 910.

WHEREFORE, petitioner prays for a rehearing of the decision in this matter rendered by this Court on December 13, 1965 or, in the alternative, for a modification of said decision, striking therefrom the provision for reinstatement of the judgment of the District Court in favor of the plaintiff Albanese and remanding the case to the Court of Appeals for the Second Circuit for further consideration in accordance with this Court's decision herein.

Dated: New York, New York
December 30, 1965.

Respectfully submitted,

N.V. Nederland Amerik Stoomv. Maats.

By .....
EDMUND F. LAMB
Attorney for Respondent

Certificate of Counsel

I certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

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EDMUND F. LAMB
Counsel

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 557

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

—and—

ANTHONY ALBANESE,

Co-Petitioner,

—against—

N.V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

PETITION OF INTERNATIONAL TERMINAL OPERATING CO., INC. FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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JOSEPH ARTHUR COHEN
On Petition

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 557

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

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ANTHONY ALBANESE,

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—against—

N.V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

PETITION OF INTERNATIONAL TERMINAL OPERATING CO., INC. FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that this Court grant rehearing of its order of December 13, 1965, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed on or about September 9, 1965.

Reasons for Granting Rehearing and Issuing the Writ

1. In its revised opinion filed June 15, 1965 the United States Court of Appeals for the Second Circuit reversed, and remanded for new trial, a judgment based upon a jury verdict which awarded plaintiff, Anthony Albanese, $145,000.00 against defendant, N.V. Nederl. Amerik Stoomv. Maats., and which dismissed the latter's third-party complaint for indemnity against petitioner herein, International Terminal Operating Co., Inc. Plaintiff, Anthony Albanese, petitioned this Honorable Court for the issuance of a writ of certiorari (No. 523) as did this petitioner (No. 557).

In opposing this petitioner's petition, the respondent, N.V. Nederl. Amerik Stoomv. Maats., argued in its brief (pages 1 and 2) that a reversal and remand of the dismissal of the third-party complaint was automatically required upon reversal and remand of the judgment in favor of Albanese because "the issue of respondent's right to indemnification from the co-petitioner, third-party defendant, must be determined within the context of the proof presented upon the retrial." The action for indemnity was thus viewed by the respondent as the tail being wagged by the dog of the primary action.

This Honorable Court, in its order of December 13, 1965, granted Albanese's petition and summarily re-instated the judgment in his favor, but it denied this petitioner's petition. If reversal of Albanese's judgment required automatic reversal of the petitioner's judgment dismissing the third-party complaint, as respondent has argued, then reinstatement of Albanese's judgment should require re-

instatement of that portion of the same judgment which dismisses the third-party complaint.

Respondent conceded that there was ample proof, and for the purposes of the appeals herein it must be assumed as established fact, that the longshoremen requested the ship's mate to turn on the ship's ventilating system, the mate promised to do so, and the mate requested the longshoremen to continue working. The jury was charged that indemnity could be denied upon factual findings of (1) a complaint to a ship's officer as soon as the dangerous condition was known or should reasonably have been known by the stevedore, (2) a direction or request by the ship's officer that the longshoremen continue working, and (3) an added assurance by the ship's officer that the dangerous condition would be promptly and entirely eliminated. Obviously, in finding for Albanese against the respondent, and in denying respondent's claim for indemnity against petitioner, the jury made such fact findings. Indeed, the jury was given no other means of exonerating your petitioner. The verdict, therefore, was a symmetrical and harmonious evaluation of the conduct of the three parties to this litigation. It should not be fragmented upon appeal.

This Honorable Court has already found an absence of error in the charge relating to Albanese's action. There is a corresponding absence of error in the charge relating to the indemnity action. Rehearing should be granted, and a writ should issue, to correct appellate error and to restore a valid and consistent verdict based upon substantial evidence and a proper charge.

2. The importance of obtaining clarification from this Honorable Court of what constitutes indemnity defeating

conduct cannot be overstressed. The undersigned, who represent many stevedoring companies in the Port of New York, can attest to the many pending cases wherein realistic prognostication and evaluation are precluded by reason of the complete absence of controlling guidelines from this Court. Such a situation restricts settlements and requires more trials with resultant further conflict and confusion.

Presenting as it does the optimum of indemnity defeating conduct on the part of a shipowner as any stevedore could ever realistically hope to prove upon trial, this action makes an ideal vehicle for a comprehensive and definitive opinion by this Honorable Court in this most troublesome area of law. Indeed, the Courts themselves seek such clarification, *Misurella* v. *Isthmian Lines, Inc.*, 215 F. Supp. 857, 861, aff'd 328 F. 2d 40; and *McNamara* v. *Weichsel Dampschifffahrts*, 293 F. 2d 900, 903.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that a rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Second Circuit.

December 28, 1965

Respectfully submitted,

SIDNEY A. SCHWARTZ
Attorney for Petitioner

JOSEPH ARTHUR COHEN
On Petition

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

SIDNEY A. SCHWARTZ
Attorney for Petitioner

Certificate of Service

This is to certify that on the 3rd day of January, 1966, copies of the above petition have been mailed to:

Edmund F. Lamb, attorney for N.V. Nederl. Amerik Stoomv. Maats., at his office: 80 Broad Street, New York, New York 10004; and to

Philip F. DiCostanzo, attorney for Anthony Albanese, at his office: 66 Court Street, Brooklyn, New York 11201.

SIDNEY A. SCHWARTZ

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MAY 25 1966
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Supreme Court of the United States

OCTOBER TERM, 1965

No. 557

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

—against—

N.V. NEDERL. AMERIK STOOMV. MAATS,

Respondent.

MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING AND SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 557

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

—against—

N.V. NEDERL. AMERIK STOOMV. MAATS,

Respondent.

MOTION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed Second Petition for Rehearing of the order of this Court denying the petition for writ of *certiorari* in this case, entered on December 13, 1965, on which order rehearing was denied on January 31, 1966. Rehearing is sought at this time on the sole ground that, as is set forth in the annexed petition, a petition for writ of *certiorari* to the Court of Appeals for the Fifth Circuit in the case of *Waterman Steamship Corporation* v. *Atlantic & Gulf Stevedores, Inc.*, 353 F. 2d 660 (1965), was docketed with this Court on April 26, 1966 (No. 1255 of the October Term, 1965) and that case presents for review matters identical to those here presented.

The major issues presented for review in *Waterman* are what constitutes "indemnity precluding conduct" under this Court's opinion in *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, and whether

such determination is one of fact for a jury or of law for a Court. The resolution of these issues by the Fifth Circuit in *Waterman* is directly contrary to the resolution of similar issues by the Second Circuit in the instant case. Indeed, one of the grounds urged by petitioner in the *Waterman* case is that very conflict between the Fifth Circuit and the Second Circuit.

As the instant case presents the same issues that are involved in the *Waterman* case, your petitioner respectfully prays that a writ of *certiorari* issue in this case as well as in the *Waterman* case in order that a definitive ruling ending the conflict between the various Circuits might be had.

Although mindful of Rule 58 proscribing the filing of consecutive petitions for rehearing, petitioner invokes the power of this Court to rescind the denial of *certiorari* under the authority of *Bowden* v. *Fort Smith,* 316 U. S. 584, 589 (1942), and *Helvering* v. *Southwest Consolidated Corporation,* 316 U. S. 710 (1941).

Supreme Court of the United States

OCTOBER TERM, 1965

No. 557

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

—against—

N.V. NEDERL. AMERIK STOOMV. MAATS,

Respondent.

SECOND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of December 13, 1965, denying the petition for writ of *certiorari*, and the subsequent denial of rehearing entered January 31, 1966, and that a writ of *certiorari* issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case, as prayed for in the petition filed on or about September 9, 1965, and the petition for rehearing filed on or about January 4, 1966.

Reasons for Granting Rehearing and Issuing the Writ

The petition for rehearing herein was denied on January 31, 1966. On April 26, 1966, a petition for a writ of *certiorari* to the Court of Appeals for the Fifth Circuit in the case of *Waterman Steamship Corporation* v. *Atlantic & Gulf Stevedores, Inc.*, 353 F. 2d 660 (1965), was

filed with this Court. As stated in the opening sentence of the opinion of the Fifth Circuit in *Waterman*:

> "This appeal turns on the *Weyerhaeuser* corollary to the *Ryan* doctrine of stevedore-shipowner indemnity."

The petition for a writ of *certiorari* filed in *Waterman* presents for review the question of what constitutes "indemnity precluding conduct" on the part of a shipowner, and whether such determination is one of fact for the jury or of law for the Court. Such petition in *Waterman* urges the conflict between the Fifth Circuit and the Second Circuit and cites the opinion of the Second Circuit in the instant case no less than four times as evidence of such a conflict. That such conflict exists is beyond dispute as the action of the Second Circuit in reversing a jury verdict for the stevedore in the instant case was diametrically opposed to the action of the Fifth Circuit in affirming a jury verdict for the stevedore in the *Waterman* case.

There was, concededly, proof in the instant case that (1) the stevedore complained to a ship's officer as soon as the dangerous condition was known or should reasonably have been known, *and* (2) the ship's officer directed the stevedore to continue working under the dangerous condition, *and* (3) the ship's officer assured the stevedore that he would promptly and entirely eliminate the dangerous condition, *and* (4) the stevedore complied with such direction and assurance. In its opinion in the instant case, 346 F. 2d 481, 484, the Second Circuit held that the foregoing was inadequate evidence of active "hindrance" which would constitute indemnity precluding conduct on the part of the shipowner.

The Fifth Circuit in *Waterman* and the Second Circuit in the instant case both dealt with jury verdicts in favor

of the stevedore on the issue of the shipowner's right to indemnity, and they reached contradictory results by reason of their conflicting opinions of the applicable law. In the event that this Court grants *certiorari* in the *Waterman* case, which is earnestly desired, it is respectfully urged that this case should be considered along with it by reason of its conflicting approach to a common issue to the end that the law may be clarified for the guidance of all Courts called upon to interpret and apply maritime law in the ever increasing number of cases between shipowner and stevedore.

CONCLUSION

For the reasons set forth above and in the petitions for writ of *certiorari* and rehearing, it is respectfully urged that a rehearing be granted and, upon such rehearing, a writ of *certiorari* issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

SIDNEY A. SCHWARTZ
Attorney for Petitioner

JOSEPH ARTHUR COHEN
Of Counsel

Certificate of Counsel

I hereby certify that the foregoing Second Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

SIDNEY A. SCHWARTZ
Attorney for Petitioner

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